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No. 80-947

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1980

LARRY LEON CHANEY,

*Petitioner,*

v.

THE STATE OF OKLAHOMA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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## QUESTIONS PRESENTED

1. Whether, in a capital case, the Sixth, Eighth, or Fourteenth Amendments to the United States Constitution are violated when a potential juror who admits the death penalty is proper in some circumstances is excused from jury service for cause merely for stating she believed it would be "difficult or impossible" for her to vote to impose capital punishment in the instant case.

2. Whether the Oklahoma capital murder statute, 21 O.S. Supp.1980, Sections 701.7-701.15, as applied to the instant case, is repugnant to the Sixth, Eighth, or Fourteenth Amendments to the United States Constitution, because:

   A. It expressly denies the sentencing jury in a capital case the benefit of a presentence investigation or report covering aspects of the accused's character and absence of a previous criminal record that might mitigate in favor of a non-capital penalty.

   B. Its aggravating circumstances are void for vagueness, at least in the absence of suitably detailed clarifying instructions as to their statutory meanings by the trial judge for the benefit of the jury.

   C. It forbids the trial judge from defining for the benefit of the jury the meaning of proof beyond a reasonable doubt, either on the issue of guilt or on the issue of the existence of an aggravating circumstance.

   D. It permits the imposition of a death sentence following a murder conviction supported only by circumstantial evidence.

3. Whether in the absence of a hearing on the matter, a "consent" to search private real property, purportedly made to police by an arrestee immediately after being arrested in his home before dawn, without a warrant, and without first being informed of his right to refuse consent, may be deemed intelligent and voluntary within the meaning of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

4. Whether, as an exception to the Warrant Clause of the Fourth Amendment to the United States Constitution, applied to the States through the Fourteenth Amendment thereof, and in the

absence of a valid consent, probable cause exists to justify:

A. The warrantless arrest on a charge of kidnapping, of a person in his home at night solely because, more than eight hours earlier, an extortion telephone call to the home of a missing person was traced as having originated from a telephone in the home of the arrestee.

B. The warrantless search, reassembly, and seizure of torn paper found inside of a waste basket by police seeking the whereabouts of a missing person, where the basket is located in the home of a person who has been arrested without resistance sometime beforehand across the room from the waste basket at the exterior door to his dwelling.

C. The warrantless search for and seizure of corpses from beneath the surface of a tract of real estate located more than 100 miles away from either the site of a kidnapping or the site of the arrest of a suspect in the kidnapping, where the arrestee possessed a land contract interest in the realty, and where the search and seizures took place more than three days after the arrest and more than five days after the kidnapping.

5. Whether the Sixth, Eighth, or Fourteenth Amendments to the United States Constitution require that a death sentence be vacated or a murder conviction be reversed on account of any of the following judicial rulings or prosecutorial conduct, individually or cumulatively:

A. The trial judge's allowance of the prosecutor's offering of incompetent and prejudicial evidence including photographs to link the accused with, the death of a person for which the accused had been charged but denied trial over his objection.

B. The trial judge's allowance of the prosecutor's repeated presentation of evidence bearing on the issue of aggravating circumstances during the first stage of a bifurcated trial in a capital case.

C. The trial judge's refusal to permit the accused to impeach the unexpected testimony of his own witness with the hearsay testimony of another defense witness.

D. The trial judge's refusal to permit the accused to offer hearsay testimony of his own good character, either on the issue of guilt during the first stage of trial, or on the issue of capital punishment during the second stage of trial.

E. The prosecutor's unnecessary but prejudicial comments during closing arguments of both trial stages in a capital case.

F. The prosecutor's failure to support with any or with sufficient, legal evidence allegations of aggravation contained within the accusatory instruments and used by the jury as the basis for imposing the death penalty, and the sentencing jury's failure to specifically find as fact the existence of any of the enumerated allegations of aggravating circumstances.

6. Whether the Fifth Amendment to the United States Constitution, as it should be applied to the States through the Fourteenth Amendment, forbids a State from instituting a criminal charge for which the death penalty may be imposed against an accused, by information rather than by grand jury indictment.

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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Petitioner Larry Leon Chaney prays that a writ of certiorari issue to review the judgment and sentence of the Court of Criminal Appeals of The State of Oklahoma, entered in the above-entitled case on May 15, 1980, with rehearing denied on September 12, 1980.

## CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of The State of Oklahoma is reported in 612 P.2d 269 (Okla.Cr.1980) and is printed in Appendix B hereto, *infra,* p. 1b.

## JURISDICTION

The judgment of the Court of Criminal Appeals of The State of Oklahoma was entered on May 15, 1980. *Chaney v. State,* 612 P.2d 269 (Okla.Cr.1980); Appendix B, *infra,* p. 1b. Rehearing was denied on September 12, 1980. P.2d (Okla.Cr.1980); Appendix C, *infra,* p. 1c. Mr. Justice Byron R. White, as Circuit Justice for the Tenth Circuit, granted the petitioner's motion on November 3, 1980, to extend the time to file this petition to and including December 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See Appendix A and Appendix D, *infra.*

## STATEMENT OF THE CASE

In the afternoon of Thursday, March 17, 1977, Mrs. Kendal Ashmore disappeared from her home in Tulsa, Oklahoma, together with her assistant, Miss Kathy Brown. That evening her husband, Mr. Philip H. Ashmore, received a telephone call from a male voice who said that he had kidnapped Mrs. Ashmore and who implied that he would kill her unless Mr. Ashmore paid the sum of Five Hundred Thousand Dollars in extortion money. Mr. Ashmore notified police and the Federal Bureau of Investigation who arranged to intercept, trace, and tape record conversations occurring on Mr. Ashmore's home telephone, and did so with Mr. Ashmore's permission.

In the morning of the next day, March 18, 1977, police found the pickup truck that Mrs. Ashmore had been driving when she disappeared. It was parked near 91st Street and Memorial Road in Tulsa. Inside the truck, police found a note in Mrs. Ashmore's handwriting and some Arby's wrappers. The note read: "Richard Elloit, 91st and Memorial, 1:00 p.m." Mr. Ashmore told police his wife had left to meet a man who sought her expert

advice about Morgan horses.

At about seven o'clock in the evening of March 18th, the extortionist called Mr. Ashmore's home again at telephone number 299-9791, this time expressly threatening to kill Mrs. Ashmore unless his demands were met, and gave Mr. Ashmore instructions for delivering the money which Mr. Ashmore followed. The Southwestern Bell Telephone Company traced this call and found that it had originated from a telephone in the petitioner's home. Two hours later, the extortionist made a third call to the Ashmore residence, telling Mr. Ashmore that he had left the money at the wrong location and reinstructing him as to its redelivery. Southwestern Bell traced the origin of this call to a certain pay telephone located at 61st Street and Yale Avenue in Tulsa. When police dusted this telephone shortly afterwards, they lifted a latent partial palm print.

At or about 3:30, but before dawn, in the morning of March 19, 1977, between six and seven hours after the third extortion telephone call was made and between eight and nine hours after the second call was traced to the petitioner's home, police went there and arrested him without a warrant when he opened his front door pursuant to their knock. Police predicated this arrest solely upon their having traced the second extortion call to the petitioner's home, and used the threats the extortionist made during that conversation to justify a warrantless top-to-bottom search of the premises that ensued. After the arrest, to which the petitioner offered no resistance (Tr. 510), 15 police officers (Tr. 506) entered the petitioner's mobile home that measured twelve by 60 feet (Tr. 571) seeking to find Mrs. Ashmore and Miss Brown. They found only the petitioner's girl friend and her small child. (Tr. 511-512). Police did not advise the petitioner of his right to refuse them consent to search his property because officers conducting the search "didn't know he had a right [to refuse consent] at that particular time." (Tr. 515). Sometime after the petitioner's arrest, the Federal Bureau of Investigation searched a waste basket situated across the room from the exterior door on the threshold of which police had arrested the petitioner beforehand. Out of that waste basket, the F.B.I. retrieved shredded paper that, when reassembled, revealed the following notation: "1:00 P.M. Thursday Richard Elloit 299-9791." (Tr. 579).

Three days after the petitioner's arrest, on March 22, 1977, police commenced a warrantless search of a tract of real estate in Sallisaw, Oklahoma, located 100 miles from Tulsa, in which the petitioner possessed a land contract interest. There, police exhumed from a shallow grave the bodies of Mrs. Ashmore and Miss Brown, both bound and gagged.

On March 28, 1977, the respondent charged the petitioner with having committed four felonies, to-wit: (1) kidnapping Miss Kathy Ann Brown for the purpose of extortion (No. CRF-77-704); (2) kidnapping Mrs. Kendal Inez Ashmore for the purpose of extortion (No. CRF-77-705); (3) first degree murder of Miss Kathy Ann Brown (CRF-77-755); and (4) first degree murder of Mrs. Kendal Inez Ashmore (No. CRF-77-756).

Upon motion of the respondent over the petitioner's objection, the trial court severed from the other charges the charge (No. CRF-77-756) that the petitioner committed first degree murder in the death of Mrs. Ashmore. On September 6, 1977, the petitioner came to trial on that charge alone in the District Court of Tulsa County before the Honorable Jay D. Dalton, Judge.

In advance of the trial, the respondent tendered to the petitioner pursuant to applicable Oklahoma law a bill of particulars in which it alleged the presence of four aggravating circumstances on the basis of which it would seek the death penalty against the petitioner in the death of Mrs. Ashmore. The respondent alleged the aggravating circumstances for the reasons stated, *infra*, in Appendix E.

Among the potential jurors summoned as veniremen for the petitioner's trial was Miss Betty Jo Fetterly. (Tr. 86). She was asked by petitioner's defense counsel if she could imagine a case where she could feel the death penalty would be proper, to which she responded *affirmatively*. (Tr. 97). Subsequently, Miss Feterly was excused for cause from jury service in the instant case upon motion of the respondent over petitioner's objection and exception. (Tr. 100).

The Oklahoma Court of Criminal Appeals remarked that evidence pointing to the petitioner's guilt in the death of Mrs. Ashmore was circumstantial. 612 P.2d 269, 275 (Okla. Cr.1980); Appendix B, *infra*, p. 1b. The same court concluded later, also, that the respondent presented evidence relating to the aggravating circumstances even during the *first* stage of the trial. Id. at 280; Appendix B, *infra*, p. 1b.

Among the items of evidence the respondent introduced at trial over the petitioner's objections as part of its case-in-chief were things seized during the warrantless search of the petitioner's home on the morning of his arrest, including particularly the reconstructed note bearing the words: "1:00 P.M. Thursday Richard Elloit 299-9791"; (Tr. 579) 612 P.2d 269, 277; Appendix B, *infra,* p. 1b; as well as soil samples from the grave site, clothing and ligatures found on the bodies of Mrs. Ashmore and Miss Brown when they were exhumed during the warrantless search police made of the real estate located in Sallisaw, Oklahoma, in which the petitioner possessed a land contract interest. Among the items of evidence the respondent introduced over the petitioner's objections as part of *both* its case-in-chief and its proof of aggravating circumstances were photographs of the grave scene [Respondent's Exhibits 44 through 61, 104, and 105] located on the same real estate in Sallisaw and taken by police during the same warrantless search. Respondent's Exhibits 104 and 105 were photographs of *Miss Brown's* corpse, bound and gagged, and in a state of partial decomposition. "These photographs allowed the jury to see the manner in which the *victims* had been bound and the way in which *they* were killed * * *." 612 P.2d 269, 275; Appendix B, *infra,* p. 1b (emphasis added).

Throughout both stages of the bifurcated trial, counsel for the respondent referred, over the petitioner's repeated objections, to Mrs. Ashmore being the mother of young children. (Tr. 1278-1279, 1282). On closing argument in the first trial stage, again over the petitioner's objection, counsel for the respondent alluded to the petitioner as being a "serpent" such as St. Patrick drove out of Ireland! (Tr. 1184). Subsequently, the Oklahoma Court of Criminal Appeals found those remarks "unnecessary," [but] they were not so grossly improper as to affect the jury's verdict." 612 P.2d 269, 275; Appendix B, *infra,* p. 1b.

The petitioner called ten witnesses as part of his defense-in-chief, four of whom were adverse witnesses and three of whom were character witnesses. The trial court refused to allow one of the petitioner's character witnesses to offer "hearsay" testimony about a then-recent act of heroism by the petitioner, either during the first stage of the trial (Tr. 960-69) or during its second stage in mitigation of capital punishment. (Tr. 1264-66). Even though 21 O.S.Supp.1977, Section 701.10 provides that at the sentencing

stage of a bifurcated trial in a capital case, "evidence may be presented as to *any* mitigating circumstances" (emphasis added), in the instant case afterwards the Oklahoma Court of Criminal Appeals concluded that "[w]e take this to mean that a defendant may present any relevant evidence, *within the limitations of the rules of evidence,* bearing on his character * * *." 612 P.2d 269, 279-280; Appendix B, *infra,* p. 1b (emphasis added).

The trial judge refused, also, to permit the petitioner to impeach the unexpected testimony of one of his own witnesses, either by means of cross-examination (Tr. 914) or by means of the hearsay testimony of another defense witness (Tr. 918). The Oklahoma Court of Criminal Appeals summarized the facts of this event at 612 P.2d 269, 280; Appendix B, *infra,* p. 1b.

On September 14, 1977, the jury retired to deliberate the guilt or innocence of the petitioner, (Tr. 1232). The record does not reflect that the trial court offered any instructions to the jury between the end of the respondent's closing argument and the beginning of their deliberations. Just before midnight of the same day, the jury found the petitioner guilty of murder in the first degree. (Tr. 1235).

The next day, on September 15, 1977, the second trial stage occurred, (Tr. 1239), during which the respondent read to the jury the entire bill of particulars in which it alleged the existence of four aggravating circumstances warranting the death penalty. (Tr. 1249-1250). Notwithstanding the petitioner's objection that the respondent's evidence failed to show the existence of any one of those four alleged aggravating circumstances, (Tr. 1245), the jury returned the following verdict as to sentence:

> "We the jury, drawn, impaneled and sworn in the above-entitled cause, do upon our oaths, having heretofore found the defendant, Larry Leon Chaney, guilty of murder in the first degree, fix his punishment at death. (Tr. at 1289).

Nowhere in the record is there any indication that the jury found as fact the existence of any one of the aggravating circumstances enumerated by the state in its bill of particulars. Nevertheless, on September 22, 1977, the trial court sentenced the petitioner to death.

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The petitioner first objected to the statute under which he was charged at his district court arraignment after the trial of his preliminary hearing and at the time of his formal plea of not guilty by filing a formal written motion to dismiss challenging the statute under which he was charged as violating the Eighth and Fourteenth Amendments to the United States Constitution (See Appendix D). At trial, the petitioner objected once again to the statute under which he was charged in addition to any and all instructions regarding it (T.1108-09). On appeal, the Court of Criminal Appeals of The State of Oklahoma rejected all the petitioner's assignments of error regarding the statute under which he was convicted and sentenced, both on its face and as applied to the petitioner (See Appendix B, p. 279-80).

The petitioner objected to the exclusion of a potential juror for cause, Ms. Feterly, after her equivocation and ambivalence in answering questions regarding her opinion of the imposition of the death penalty, and specifically urged the trial court to adhere to the requirements of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770 (1968). The trial court rejected the petitioner's argument and, when raised on appeal, the Court of Criminal Appeals of The State of Oklahoma decided against the petitioner and specifically held that Ms. Feterly was properly excused for cause under the *Witherspoon* holding (See Appendix B, p. 274).

The petitioner also objected to the introduction of evidence of aggravation by the respondent during the guilt determination or first stage of the trial and moved for a mistrial after the objection was overruled. The evidence of aggravation was allowed in the first stage and, on appeal, the Court of Criminal Appeals of The State of Oklahoma found that such evidence was error, but that the error was harmless and held that regardless of its admission, petitioner would unquestionably have been convicted (See Appendix B, p. 280).

The petitioner objected to certain statements made by the respondent during its closing argument in both the first and second stage of the trial which were overruled by the trial court, and on appeal, the Court of Criminal Appeals of The State of Oklahoma found that, although the remarks were unnecessary, they were not so grossly improper as to affect the jury's verdict and therefore did

not require the judgment and sentence to be reversed nor modified (See Appendix B, p. 275).

The petitioner raised the issue of the voluntariness of any alleged consent to search his property at the time of his arrest in his petition for rehearing to the Court of Criminal Appeals of The State of Oklahoma, which was specifically rejected when the petition for rehearing was overruled on September 12, 1980 (See Appendix C).

## REASONS FOR GRANTING THE WRIT

### I.

### THE EXCLUSION OF A JUROR, AFFIRMED BELOW, WAS IN DIRECT CONFLICT WITH *DAVIS V. GEORGIA*, AND THE PETITIONER'S DEATH SENTENCE SHOULD BE VACATED *SUMMARILY*.

The decision of the court below as to the first question raised in this petition is directly in conflict with this Court's decision in *Davis v. Georgia*, 429 U.S. 122 (1976). In *Davis*, this Court held *per curiam* that:

> Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," * * * he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand." Id. at 123, quoting from *Witherspoon v. Illinois*, 391 U.S. 510, 522, n.21 (1968).

This Court has reached the same result in other cases. *Wigglesworth v. Ohio*, 403 U.S. 947 (1971); *Harris v. Texas*, 403 U.S. 947 (1971); and *Adams v. Washington*, 403 U.S. 947 (1971).

Among the potential jurors summoned as veniremen for the petitioner's trial in the instant case was Miss Betty Jo Feterly. (Tr. 86). On *voir dire* examination by petitioner's defense counsel, this potential juror was asked:

> "Is there a case you can imagine where you could feel that the death penalty would be a proper penalty?" (Tr. 97).

Miss Feterly responded:

> "Yes, sir." (Id.)

Subsequently, Miss Feterly remarked to petitioner's defense counsel that:

> "I feel that I would—it would be difficult or impossible for me to give the death penalty." (Tr. 99)

Upon *voir dire* examination by the respondent, this potential juror explained:

> "I mean, personally, emotionally, my personal emotional makeup, it would be difficult for me to do so. That is the reason why I could not be completely impartial." (Id.)

Thereupon, the trial judge conducted the following colloquy with Miss Feterly:

> "* * * I think you made the statement you could not be fair and impartial in this particular case because the death penalty could possibly be imposed. Is that correct? (Tr. 100)

Upon agreeing with the trial judge's question, Miss Feterly was excused by the trial court from jury service in the instant case for cause upon the respondent's motion over the petitioner's objection and exception. (Id.).

Never did Miss Feterly state unambiguously, or at all for that matter, that she would automatically vote against imposition of the death penalty in the instant case no matter what the trial might reveal. Therefore, it cannot be assumed that that was her position. *Witherspoon v. Illinois, supra,* at 516, n.9; *accord: Boulden v. Holman,* 394 U.S. 478, (1969); *Maxwell v. Bishop,* 398 U.S. 262 (1970). On the contrary, Miss Feterly told the petitioner's defense counsel that she *could* imagine a case where she could feel that the death penalty would be a proper punishment. (Tr. 97).

Recently, this Court has emphasized that strict compliance with *Witherspoon* is necessary in order for a state to constitutionally execute a death sentence. *Adams v. Texas,* 100 S.Ct. 2521 (1980). There, this Court reaffirmed that:

> [T]o exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views

about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." Id. at 2521.

In the instant case, prospective jurors including Miss Feterly were questioned by counsel for both the petitioner and the respondent, as well as by the trial judge. As the Oklahoma Court of Criminal Appeals recognized, "one of the tendencies of *voir dire* in a challenge situation is that the longer it lasts the less objective it becomes[.]" *Chaney v. State,* 612 P.2d 269, 274 (Okla.Cr.1980). The more Miss Feterly thought about capital punishment during rather than before the jury selection process, it would appear, the more she seized upon it as being a convenient excuse for avoiding jury duty. The trial court should have recognized her motive and refused to excuse her.

In addressing the issue of Miss Feterly being excused from jury duty for cause in the instant case, the court below seemed to ignore or be ignorant of this Court's recent decisions. It determined the petitioner's argument that exclusion of Miss Feterly denied him a jury representing a cross-section of the community was "without foundation" because "in the present case only one prospective juror was exclused on the *Witherspoon* issue, and we find that this was valid." *Chaney v. State, supra,* at 274. Clearly, that court's reasoning defies this Court's holding in *Davis v. Georgia, supra.* As it did in *Davis,* this Court should vacate the petitioner's sentence of death *summarily.* If the Court were to vacate the petitioner's death sentence in this manner, that action would moot the second question raised in this petition and avoid the need for this Court to address the constitutionality of Oklahoma's statutes.

## II.

## OKLAHOMA'S CAPITAL MURDER STATUTE, UPHELD BELOW, IS PROBABLY IN CONFLICT WITH *LOCKETT V. OHIO;* FORBIDS A TRIAL JUDGE FROM EXPLAINING TO A JURY THE MEANING OF PROOF BEYOND A REASONABLE DOUBT; AND PERMITS IMPOSITION OF CAPITAL PUNISHMENT UPON CIRCUMSTANTIAL EVIDENCE.

The decision of the court below as to the second question raised in this petition is probably in conflict with this Court's decision in *Lockett v. Ohio,* 438 U.S. 586 (1978). In *Lockett,* four justices of this Court held in their plurality opinion, written by Mr. Chief Justice Burger, that:

> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects and to defendant's character and record in the circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments. Id. at 605.

On the contrary, the Oklahoma capital murder statute, 21 O.S. Supp.1977, Section 701.10, provides in pertinent part:

> Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the Court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceedings shall be conducted by the trial judge before the trial jury as soon as practical *without presentence investigation* * * *. (Emphasis added).

While the statute provides for the presentation of mitigating circumstances or evidence by the accused upon conviction, the statute's express prohibition of a presentence investigation deprives a person who has been convicted of a capital offense of the right to have a presentence investigation—a right enjoyed by persons convicted of every other felony offense under Oklahoma

law pursuant to 22 O.S.Supp.1977, Section 982.

The plurality opinion of Mr. Chief Justice Burger, written for *Lockett,* observed that:

> [W]here sentencing discretion is granted, it generally has been agreed that the sentencing judge's "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant—*if not essential*—[to the] selection of an appropriate sentence * * *." Id. at 602-603, quoting from *Williams v. New York,* 337 U.S. 241, 247 (1949). Emphasis added by Mr. Chief Justice Burger).

Shortly thereafter, in the same plurality opinion, The Chief Justice reflected upon the words of Mr. Justice Black written for this Court in another capital case, *Williams v. Oklahoma,* 358 U.S. 576 (1959):

> In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, *if not required,* to consider all the mitigating and aggravating circumstances involved in the crime. Id. at 585. (Emphasis added by Mr. Chief Justice Burger).

There is no rational reason why a sentencing *jury,* just as a sentencing judge, should not be equally required to consider *all* mitigating circumstances in a capital case. And that is precisely what this Court held in *Lockett v. Ohio, supra:*

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer * * * not be precluded from considering *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Id. at 604. (Emphasis in the original).

Use of the word "sentencer" in *Lockett* clearly indicated this Court's intention to impose the same duty upon sentencing jurors as upon sentencing judges. As The Chief Justice's plurality opinion in *Lockett* concluded: "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." Id. at 608. In that opinion, also, The Chief Justice observed that "[n]one of the statutes we sustained in *Gregg* [*v. Georgia,* 428 U.S. 153 (1976)] and the companion

cases clearly operated at that time to prevent the sentencer from considering *any* aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." Id. at 607. (Emphasis added).

The decision of the court below is probably in conflict, also, with this Court's decisions in *Godfrey v. Georgia*, ____ U.S. ____, 100 S.Ct. 1759 (1980), *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Furman v. Georgia*, 408 U.S. 238 (1972), because of the unfettered discretion delegated to jurors pursuant to the Oklahoma statute in question. In *Gregg*, this Court held that:

> [W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. *Gregg v. Georgia, supra*, at 189.

In *Godfrey v. Georgia, supra*, this Court held even more pointedly:

> Part of a State's responsibility * * * is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." *Gregg v. Georgia, supra*[.] * * * It must channel the sentencer's discretion by "clear and objective standards" [quoting from *Gregg v. Georgia, supra*, at 198] that provide "specific and detailed guidance" [quoting from *Proffitt v. Florida*, 428 U.S. 242, 253 (1976)] and that make rationally reviewable the process for imposing a sentence of death [quoting from *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976)]. 100 S.Ct. 1759 at 1764-1765.

Clearly, the Oklahoma statute in question failed to provide sufficient sentencing standards to the jury in the petitioner's case.

This Court has never addressed, to the petitioner's knowledge, the issues of whether a death sentence may be imposed solely upon circumstantial evidence of guilt, or pursuant to a statute that forbids the trial judge from defining for the benefit of the jury the meaning of proof beyond a reasonable doubt. It is time for the Court to do so.

## III.

### ADMISSION OF EVIDENCE AT TRIAL, AFFIRMED BELOW, IS PROBABLY IN CONFLICT WITH *BUMPER V. NORTH CAROLINA*, AND THIS CONFLICT MUST BE RESOLVED NOW IN VIEW OF *STONE V. POWELL*.

The decision of the court below as to the third question raised in this petition is probably in conflict with this Court's decision in *Bumper v. North Carolina,* 391 U.S. 543 (1968). This Court said in *Bumper* that:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. Id. at 548-549.

Yet, at best all the petitioner did in the instant case was to "acquiesce to a claim of lawful authority." Id. This is evident from the testimony of one of the officers who searched the petitioner's home following the petitioner's arrest there in the early hours of the morning, who admitted at the trial that he "didn't know [the petitioner] had a right [to refuse consent] at that particular time [the time of arrest]. (Tr. 515).

Although the court below has admitted that "every warrantless search is per se unreasonable", *Chaney v. State,* 612 P.2d 269, 277 (Okla.Cr.1980), it did not address the issue of the petitioner's consent in the instant case. One reason for its failure to do so is that the petitioner did not articulate this issue, either at trial or on appeal. However, the petitioner requests this Court to consider the validity of his purported "consent" now notwithstanding his failure to raise this issue at trial or on appeal, because: (a) he did raise the issue in his petition for rehearing before the court below, which that court entertained on its merits but denied without a substantive opinion on this issue; (b) in the light of *Bumper,* the trial court should have raised this issue *sua sponte,* as the court below should have done on appeal; (c) this petition will be the petitioner's only recourse in seeking redress of the consent issue, because it would be barred from consideration pursuant to a

petition for a writ of habeas corpus under *Stone v. Powell,* 428 U.S. 465, 494 (1976); and (d) implicitly, the court below must be presumed not to have deemed the petitioner's purported "consent" to have been valid, inasmuch as it attempted to justify the warrantless search of the petitioner's home on grounds that it was incidental to his arrest. *Chaney v. State, supra,* at 277.

That this Court may consider this issue at this time, if it chooses to do so, is evident from its recent decisions such as *Beck v. Alabama,* ____ U.S. ____, 100 S.Ct. 2382, 2386, n.6 (1980); *Vachon v. New Hampshire,* 414 U.S. 478 (1974). If this Court has done so in a non-capital case, such as *Vachon,* and in a capital case, such as *Beck,* there is every reason why it can do so in the case at bar.

After addressing this issue and taking jurisdiction to review it, at the very least this Court should remand to the District Court of Tulsa County the question of the petitioner's intelligent and voluntary consent to any searches and seizures of his property, with instructions for that court to conduct a *Bumper* hearing. This Court should distinguish the quantum of evidence required to show consent to the search of real property from the quantum it articulated as being required for the search of an automobile in *Schneckloth v. Bustamonte,* 412 U.S. 218, 231-233 (1973).

## IV.

## ADMISSION OF EVIDENCE AT TRIAL, AFFIRMED BELOW, IS PROBABLY IN CONFLICT WITH *PAYTON V. NEW YORK, CHIMEL V. CALIFORNIA* AND *KATZ V. UNITED STATES.*

The decision of the court below as to the fourth question raised in this petition may be in conflict with this Court's decision in *Payton v. New York,* 100 S.Ct. 1371 (1980), if that decision is to be applied retroactively, which this Court has not yet determined. Even if the decision of the court below is not in conflict with *Payton,* or if this Court determines not to apply *Payton* retroactively, nevertheless the decision of the court below is probably in conflict with this Court's holdings in *Chimel v.*

*California,* 395 U.S. 752 (1969) and *Katz v. United States,* 398 U.S. 347 (1967).

The Oklahoma Court of Criminal Appeals determined that the warrantless arrest of the petitioner in his home at night was valid because "Title 22 O.S.1971, §196, permits an arrest without a warrant by an officer when a felony has been committed and the officer has reasonable cause to believe that the person arrested committed the felony." *Chaney v. State,* 612 P.2d 269, 176-277 (Okla.Cr.1980). Undoubtedly, that Oklahoma statute is now unconstitutional in the wake of *Payton v. New York, supra.* That may not be dispositive of the issue of the validity of the petitioner's arrest in the instant case, however. For that to occur, this Court would have to apply *Payton* retroactively, which the petitioner urges that it do, and also extend the holding in *Payton* to the facts of the instant case which this Court may view as being different from a "routine" arrest, although the petitioner argues there is no significant difference.

This Court should give *Payton* retroactive effect, at least back to 1970 which is when the facts complained of in *Payton* occurred. For this Court to deprive the petitioner of the benefit of *Payton* solely because the *Payton* decision had not been handed down when the facts complained of by the petitioner arose in 1977 would be unfair, because the petitioner's grievances arose seven years after *Payton's* arose.

The instant case presents this Court with an opportunity to define the parameters of *Payton,* or to contrast this case with *Payton,* at its option. The petitioner urges that an extortion telephone call by itself and without additional evidence of wrongdoing, even if traced to a telephone at a specific private residence, should not provide police with probable cause to make a warrantless intrusion into that residence. If this Court is unwilling to adopt so pervasive a ruling, then it may prefer to add cogency to the meaning of a "routine" arrest such as formed the basis for its *Payton* decision. The petitioner calls this Court's attention to the fact that a delay of between eight and nine hours intervened between the tracing of the telephone call in question to the petitioner's residence and the warrantless intrusion there by police. (Tr. 505-506). The petitioner maintains that unreasonable delay may vitiate whatever probable cause might have justified a warrantless intrusion had one been made at once upon the tracing

of an extortion telephone call, but neither the petitioner nor law enforcement personnel across the nation have any inkling as to what amount of time separates a potential exigency that might justify a warrantless intrusion to effect an arrest and the "routine" arrest that no longer can support a warrantless intrusion into the home in the light of *Payton.*

Both time and change of geographic location may have negatived whatever exigency could have existed in the instant case when police traced the extortion telephone call to the petitioner's home. As the court below noted, "[l]aw enforcement officers did not go there immediately. Instead, Mr. Ashmore attempted to comply with the ransom demands[.]" *Chaney v. State, supra,* at 277. The court below went on to observe that the warrantless raid on the petitioner's home was organized only after another extortion telephone call was placed from a public telephone booth two hours later. Id. That being the case, two logical questions emerge: (a) Why did the police believe the caller was still at the petitioner's residence more than six hours later when they raided it? (b) Why did the police wait more than six hours before raiding the petitioner's home if they believed the missing persons were inside and in danger? The petitioner continues to maintain that the police enjoyed sufficient time between tracing the extortion call and raiding the petitioner's residence to apply for warrants authorizing them to arrest the petitioiner and to search his dwelling.

If the warrantless arrest of the petitioner was invalid, then the search of his home had to be invalid, also, if it was predicated as being incidental to the arrest. *Mapp v. Ohio, 367 U.S. 643 (1961). Assuming, arguendo,* that the petitioner's arrest may have been valid, then it may be necessary for this Court to address the issue of whether the resulting top-to-bottom search of the petitioner's home without a warrant was justified as being reasonably incidental to the arrest.

Even if the warrantless arrest of the petitioner was valid, the ensuing search would seem not to be reasonably incidental to the arrest under *Chimel v. California, supra.* To be sure, the *Chimel* police were looking for missing persons. Does that make a difference? This Court has never articulated such a difference. On the one hand, police should have labored under the expectation of a greater urgency while looking for missing persons than while

looking for stolen coins. They do not appear to have comprehended the urgency in the instant case. Is it the *objective* existence of such an urgency, or the *subjective* appreciation of the urgency by police, that justifies a warrantless search based upon an exigency? This Court should consider another factor, morever. On the one hand, it should be easier for police searching a small mobile home, such as the petitioner's, to find two missing women if they were being hidden there than to find stolen coins in a three-bedroom house that included an attic, a garage, and a small workshop, as in *Chimel.* Id. at 754. Surely, even when looking for missing persons believed kidnapped, police require guidelines from this Court such as *where* they may conduct a warrantless search. It is inconceivable that police expected to find either of the missing women, much less both of them, in the petitioner's waste basket! Nor did the information available to police when they raided the petitioner's home offer even the hint that the petitioner might have recorded on paper the whereabouts of the missing persons, which, it turned out, he did not do.

Regardless of the validity of the petitioner's arrest or the search of his home, in the absence of consent there does not seem to be any justification for the warrantless police search beneath the surface of the real estate in Sallisaw, Oklahoma in which the petitioner possessed a land contract interest. Whatever exigency, if any, might have existed at either the time when the extortion telephone call was traced or the time when police arrested the petitioner should be viewed as having been negatived with the passage of time—three days following the arrest and five days following the kidnapping. Moreover, this real estate is located more than 100 miles from where the women disappeared, either traced extortion call was made, and where the petitioner was arrested. It remains a mystery why police went to Sallisaw to begin with.

What is not mysterious is the rule of law enunciated unmistakably by this Court in *Katz v. United States, supra,* or the rationale for it. The Fourth Amendment protects people, not places. Id. at 351. And, it protects a person against governmental intrusion whenever that person reasonably harbors an expectation of privacy, Id. at 361, in the absence of certain well-recognized emergency exceptions.

This Court has never taken the opportunity to delineate

emphatically whether a murderer who buries corpses in a grave has manifested a reasonable expectation of privacy by doing so, although the answer to that question should be obvious. Nor has this Court taken the opportunity to resolve the more pointed issue of whether police who are searching for dead bodies rather than live persons can legitimately assert the emergency exception to the Fourth Amendment's Warrant Clause. The case at bar presents this Court with a controversy that mandates the resolution of these issues.

## V.

## PETITIONER SUFFERED REPEATED DENIALS OF DUE PROCESS OF LAW AND EQUAL PROTECTIOIN UNDER THE LAW, AFFIRMED BELOW.

The decision of the court below as to the fifth question raisedin this petition may be in conflict with a number of this Court's decisions, both recent and old. For this reason, the contended conflicts need to be itemized, *seriatim,* with respect to each event that is argued to be prejudicial.

### A. The decision below is probably in conflict with *Hall v. United States, Taylor v. Kentucky,* and in the principle of *Santobello v. New York.*

The decision of the court below is probably in conflict with this Court's decision in *Hall v. United States,* 150 U.S. 76 (1893), because the court below affirmed the petitioner's conviction and sentence notwithstanding the trial judge's allowance of the prosecutor's repeated attempts to blame the petitioner for the death of a person on which charge the petitioner had been denied trial over his objection and therefore should have been presumed innocent. The decision of the court below probably conflicts, also, with this Court's decision in *Taylor v. Kentucky,* 436 U.S. 478 (1978), because the trial judge in the instant case failed to instruct the jury specifically that it was to presume the petitioner innocent of the second murder charge at all times throughout both stages of his trial on the first murder charge.

In *Hall v. United States, supra,* this Court held that the attempt of the prosecutor there "to induce the jury to assume, without any evidence thereof, the defendant's guilt of a crime of which he has been judicially acquitted, as a ground for convicting him of a distant and independent crime" constituted prejudicial error. Id. at 81. To be sure, in the instant case, the petitioner had not been acquitted of causing Miss Brown's death. But because he not only had not been tried for her death, but had been denied trial of that charge on the respondent's motion over his objection, surely the petitioner must be presumed just as innocent of causing Miss Brown's death as he would be had he been tried and acquitted. Nor in the instant case are the deaths of Mrs. Ashmore and Miss Brown necessarily distant from each other. But this factor simply underscores the need for this Court to interpret its *Hall* decision in the context of the facts of the case at bar. This would avoid future confusion in the administration of criminal justice.

That the court below was confused on this issue in the instant case is apparent from its opinion. After conceding that, for a number of reasons, the petitioner should have been tried for the deaths of both Mrs. Ashmore and Miss Brown concurrently; and after concluding that "the trial court erred in denying the [petitioner's] motion to consolidate [the two charges] and that the prosecution should have consented to the consolidation"; the court below recognized that the respondent put itself in a "dillemma":

> For the purpose of bringing the defendant to trial, it claims that the two murders were separate and distinct crimes; but for the purpose of introducing evidence in this trial, it claims that the two murders were inseparable and part of a single criminal episode. *Chaney v. State, supra,* at 282; Appendix B, *infra,* p. 1b.

The court below did not resolve this dilemma when it determined merely that "the trial judge in the instant case was not certain of his authority to consolidate the information over the objection of the [respondent], thus abusing the discretion conferred upon him by the statute." Id. at 283; Appendix B, *infra,* p. 1b.

There is yet another reason why this Court should address this question. As the court below conceded, "the [respondent ]repeatedly stated [its] intention to delete all references to Ms. Brown from the [respondent's] presentation.

> But the State did not live up to its promises. *Chaney v. State, supra,* at 281; Appendix B, *infra,* p. 1b.

This Court has refused to countenance broken prosecutorial promises in other contexts, such as pursuant to guilty plea agreements. *Santobello v. New York,* 404 U.S. 257 (1971). It is imperative to the fair administration of criminal justice thatthis Court signal whether a prosecutor may break promises made during a criminal trial, either.

### B. The decision below is probably in conflict with *Gregg v. Georgia.*

The decision of the court below is probably in conflict with this Court's decision in *Gregg v. Georgia,* 428 U.S. 153 (1976), in that the court below affirmed the petitioner's conviction and death sentence notwithstanding the prosecutor's repeated presentation of evidence intended solely to show aggravating circumstances during the *first* stage of the bifurcated trial. In *Gregg,* this Court noted that:

> [T]he concerns * * * that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute * * *. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence [at the second stage]. Id. at ____.

Oklahoma has opted to follow this Court's heed in *Gregg* and in *Furman v. Georgia,* 408 U.S. 238 (1972), by creating by means of its capital murder statute [21 O.S.Supp.1977, §701.10, *et. seq.*] a bifurcated trial structure. That it has done so should mean it must follow this structure in every case including the petitioner's.

After agreeing with the petitioner's contention "that the trial court committed error by allowing the [respondent] to present, during the first stage of the trial, evidence relating to the aggravating circumstances", the court below dismissed that error as being harmless because "[e]ven had the evidence not been admitted [during the first stage], the verdict of guilt unquestionably would have been the same." *Chaney v. State,* 612 P.2d 269, 280 (Okla.Cr.1980). This Court should not tolerate a state court's flagrant attempt to substitute its view of the weight of the evidence for the view of a jury.

### C. The decision below is probably in conflict with *Chambers v. Mississippi.*

The decision of the court below is probably in conflict with this Court's decision in *Chambers v. Mississippi,* 410 U.S. 284 (1973), because the court below affirmed the petitioner's conviction and death sentence notwithstanding the trial judge's refusal to permit the petitioner to impeach the unexpected testimony of his own witness either by cross-examination or by the hearsay testimony of another defense witness.

In *Chambers,* this Court concluded that a state court's refusal to permit the defendant in that particular murder case to impeach the unexpected testimony of his own witness either by cross-examination [barred by Mississippi's "voucher" rule] or by hearsay testimony of another defense witness [barred by Mississippi's "hearsay" rule] denied that defendant "a trial in accord with traditional and fundamental standards of due process." Id. at____. In the instant case, the petitioner was barred from impeaching the unexpected testimony of his own defense witness through the interface of Oklahoma's similar "voucher" and "hearsay" rules. The petitioner appears to be reasonably similarly-situated to Chambers, notwithstanding the presence of added factors in *Chambers* not present in the case at bar, such as the repeated admissions of Chamber's witness, and the fact that those admissions in *Chambers* were declarations against the penal interests of the declarant. Nevertheless, the instant case offers this Court an opportunity to reduce ongoing speculation by announcing which aspect of the *Chambers* errors are salient violations of due process of law.

### D. The decision below is probably in conflict with *Michelson v. United States,* as well as *Lockett v. Ohio* and *Woodson v. North Carolina.*

The decision of the court below is probably in conflict with this Court's decision in *Michelson v. United States,* 335 U.S. 469 (1948), because the court below affirmed the petitioner's conviction and death sentence notwithstanding the trial judge's refusal to permit the petitioner to offer hearsay testimony of his own good character, either during the first stage of trial on the issue of his guilt, or during the second stage of trial on the issue of the

existence of aggravating circumstances warranting capital punishment.

In *Michelson,* five Justices joined in Mr. Justice Jackson's opinion of the Court in support of a 7:2 decision favoring such hearsay testimony, in which the majority noted:

> Not only is [a defendant in a criminal case] permitted to call witnesses from hearsay, but indeed such a witness is not allowed to base his testimony on anything but hearsay. What commonly is called "character evidence" is only such when "character" is employed as a synonym for reputation. Id. at 477.

Although *Michelson* was a Federal case and, as such, applied directly only to Federal criminal prosecutions, there is little doubt but that this Court viewed the same rule as being applicable in state criminal prosecutions, as is evident from a preceding passage in its opinion:

> But this line of inquiry firmly denied to the State is opened to the defendant because character is relevant in resolving probabilities of guilt. * * * [T]his Court has held that such testimony alone, in some circumstance, may be enough to raise a reasonable doubt of guilt * * *. Id. at 476, citing *Edgington v. United States,* 164 U.S. 361 (1896).

Nor is the Oklahoma rule pertaining to character witness testimony different from the Federal rule. As to such testimony during the second stage of a bifurcated trial on the issue of capital punishment, the Oklahoma statute is even more explicit and provides that an accused may present *any* mitigating evidence. 21 O.S.Supp.1977, §701.10. The court below concluded that "[w]e take this to mean that a defendant may present any relevant evidence, within the limitations of the rules of evidence, bearing on his character * * * . *Chaney v. State,* 612 P.2d 269, 279-280 (Okla. Cr.1980). That court offered as its reason for this holding that "[t]he second stage of a murder trial is like the first stage in being a fact-finding hearing, and the rules of evidence must be followed. * * * [W]e find nothing in [*Lockett v. Ohio,* 438 U.S. 586 (1978)] indicating that the rules of evidence should be abrogated during the second stage [of a bifurcated trial]. Id. at 279; Appendix B, *infra,* p. 1b.

But clearly *Lockett* was *not* silent on this point at all, and this Court's decisions in other cases leave no doubt about this matter,

either. In *Lockett,* Mr. Chief Justice Burger's plurality opinion referred consistently to the need for a sentencer [implicitly judge or jury] in a capital case to consider *any* evidence in mitigation of punishment. Id. at 585, 602-604; see *supra,* Argument on Question Two, p. ____. In *Lockett,* The Chief Justice's plurality opinion seemed to reaffirm the following passage from *Woodson v. North Carolina,* 428 U.S. 280 (1976):

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment * * * requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. *Lockett v. Ohio, supra,* at 604, quoting from *Woodson v. North Carolina, supra,* at 304.

In the instant case, the sentencing jury could not consider fully and properly the petitioner's character without being permitted to listen to hearsay testimony during the second stage of the bifurcated trial.

However, no support can be found in the decisions of this Court which limit one convicted of a capital offense to only that evidence that comports with the rules of evidence in a formal adversary setting. To the contrary, this Courts' decisions have emphasized the importance of a sentence being imposed in a more objective and less formal atmosphere as the cite from *Williams v. New York, supra,* has previously indicated.

In a capital case, this Court has made clear that:

> "[i]n discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime." *Williams v. Oklahoma,* 358 U.S. at 587.

In voiding Ohio's death statute for limiting a defendant's presentation of mitigation circumstances, this Court held in footnote twelve (12), that "nothing in this opinion limits the traditional authority to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record or the circumstances in his offense." *Lockett v. Ohio,* 98 S.Ct. at 2965 footnote twelve (12).

### E. The decision below is probably in conflict with *Williams v. United States* and *Parker v. Gladden.*

The decision of the court below is probably in conflict with decisions of this Court ranging from *Williams v. United States,* 168 U.S. 382 (1897) to *Parker v. Gladden,* 385 U.S. 363 (1961), because the court below affirmed the petitioner's conviction and death sentence notwithstanding certain unnecessary but highly prejudicial remarks made by the prosecutor in front of the jury during both stages of the trial. In *Williams,* this Court found prejudicial error when a prosecutor even in a non-capital case remarked to a jury: "no doubt, every Chinese woman who did not pay Williams was sent back." *Williams v. United States, supra,* at 398. In refusing to countenance "private talk" in the form of information spoken of to a jury that had not been placed in evidence, this Court observed in *Parker v. Gladden, supra:*

> [T]he official character of * * * an officer of the court as well as the state * * * beyond question carries great weight with a jury * * *. Id. at 365.

There, this Court was speaking about the impact the words of a bailiff would have. Here, this Court should be even more concerned because the official making the "private talk" was the prosecutor.

Examples of this conduct by the respondent's counsel in the case at bar permeate the entire record. (See, *inter alia,* Tr. 1183; 1184; 1215; 1216; 1230; 1278; 1282). Especially on closing argument at the end of both phases of the trial, the prosecutor engaged in this conduct. At the end of the first stage, on closing argument, the prosecutor alluded to the petitioner, over his objection, as being a "serpent" such as St. Patrick drive out of Ireland! (Tr. 1184). At the end of the second stage, on closing argument, the prosecutor referred incessantly, and over the petitioner's objections, to Mrs. Ashmore as being the mother of young children who would never see her children grow up. (Tr. 1278-1278, 1282). The court below found such remarks "unnecessary, [but] they were not so grossly improper as to affect the jury's verdict." *Chaney v. State,* 612 P.2d 269,275 (Okla.Cr.1980); Appendix B, *infra,* p. 1b.

This Court should compare the prosecutor's remarks in the instant case with remarks made by other court officers in the cases

of *Williams v. United States, supra,* and *Parker v. Gladden, supra,* because on their face the remarks made in the case at bar would appear to have been even more prejudicial to the accused.

### F. The decision below is probably in conflict with *Thompson v. City of Louisville* and *Godfrey v. Georgia.*

The decision of the court below is probably in conflict with this Court's decision in *Thompson v. City of Louisville,* 362 U.S. 199 (1960), because the court below affirmed the petitioner's conviction and death sentence notwithstanding the prosecutor's failure to introduce any relevant evidence whatsoever in support of at least three of the four allegations of aggravating circumstances used by the jury as the basis for imposing the death penalty. The decision of that court is probably in conflict with *Furman v. Georgia,* 408 U.S. 238 (1972), because it reached a finding of the petitioner's guilt "and then, without guidance or direction, decide[d] whether he should live or die." *Gregg v. Georgia,* 428 U.S. 153, 197 (1976).

Nowhere in the record of the instant case did the respondent even attempt directly to prove with *legal* evidence the existence of three aggravating circumstances it alleged against the petitioner: (a) that the petitioner created a great risk of death to more than one person; (b) that the petitioner committed murder for remuneration; or (c) that the petitioner committed murder to avoid arrest or prosecution. In order for the "great risk of death" circumstance to be proved, the respondent would have had to try the petitioner coterminously for causing harm to more than one person, which it did not do; or to have tried the petitioner previously and obtained a conviction for causing harm to another person, which it never did. In order for the "remuneration" circumstance to be proved, the respondent would have had to show that the petitioner was paid or anticipated being paid for killing, rather than merely for kidnapping, the victim(s). In order for the "avoidance of arrest or prosecution" circumstance to be proved, the respondent would have had to show that the petitioner was confronted with this peril prior to the moment when the

victim(s) died. The respondent neither proved or attempted to prove any of these circumstances.

As to the remaining aggravating circumstance, that the murder of Mrs. Ashmore was "especially heinous, atrocious, or cruel," the respondent attempted proof by showing that *both victims* were choked to death with pieces of cloth and buried after death in a shallow grave. (Tr. 1255-1260). This Court should address the issue of whether choking a victim to death is more "heinous, atrocious, or cruel" than shooting, in order to distinguish the instant case and similar cases from *Godfrey v. Georgia,* 100 S.Ct. 1759 (1980). Surely, the fact that a murder victim is buried in a grave, albeit shallow, cannot be evidence that the murder was "heinous, atrocious, or cruel", as opposed to its aftermath. Yet, this Court has not delineated its posture on these questions, which it should do now to avoid repeated confusion in the future.

These problems are compounded in the instant case because, not only does the Oklahoma capital murder statute [21 O.S. Supp. 1980, §701.11] not require that a jury specify the factors on which it relied in determining to impose a death penalty [see *supra*, Question Two, pp. ], but in the case at bar the trial record is devoid of any evidence that the jury found as fact the existence of any of the four enumerated allegations of aggravating circumstances the respondent contended distinguishes the petitioner's case from other homicides. The trial record is devoid also of any *reasons* why the jury would have found the existence of those aggravating circumstances, if in fact that is what it did.

In the instant case, the court below did not mention premeditation at all, but inferred heinousness and cruelty from "the manner in which the *women* were killed, coupled with the demand for ransom and the manner in which the *bodies* were disposed of * * *." *Chaney v. State, supra,* at 283; Appendix B, *infra,* p. 1b (emphasis added). Not only did that court betray its reliance upon information not in evidence, by reciting "women" and "bodies" in the plural when the petitioner has never even been tried for causing more than one death, but that court became sidetracked by considering how burial of the victim(s) occurred. This Court has never indicated whether these factors may constitutionally be considered on the issue of the death penalty, but it should do so now. Nor has this Court ever said whether a ransom demand, or

causing a victim's death by strangulation, *per se,* may constitutionally justify capital punishment, but it should do so now.

## VI.

## THE TIME HAS COME FOR THIS COURT TO RECONSIDER *HURTADO V. CALIFORNIA* IN THE LIGHT OF *BENTON V. MARYLAND* AND OTHER RECENT DECISIONS.

The sixth question raised in this petition was not raised before the court below or at the petitioner's trial. This Court has held in *Hurtado v. California,* 110 U.S. 516 (1884), information rather than by grand jury indictment as provided in the Fifth Amendment

The sixth question raised in this petition was not raised before the court below or at the petitioner's trial. This Court has held in *Hurtado v. California,* 110 U.S. 516 (1884), that a state criminal proceeding may be instituted by information rather than by grand jury indictment as provided in the Fifth Amendment to the United States Constitution. That decision was handed down almost a century ago. In *Hurtado*, this issue was raised after exhaustion of all state judicial remedies, Id. at 518. Now, the petitioner respectfully requests this Court to reconsider its prior holding in *Hurtado,* again not having raised the issue below; again in the context of a capital case; and in the aftermath of its decisions, both numerous and recent, in which this Court has applied most other protections enumerated within the Bill of Rights to defendants in state criminal proceedings: *Mapp v. Ohio,* 367 U.S. 643 (1961) [the Fourth Amendment]; *Robinson v. California,* 370 U.S. 660 (1962) [the Eighth Amendment]; *Gideon v. Wainwright,* 372 U.S. 335 (1963) [the Sixth Amendment right to the assistance of counsel]; *Malloy v. Hogan,* 378 U.S. 1 (1964) [the Fifth Amendment privilege against self-incrimination]; *Pointer v. Texas,* 380 U.S. 400 (1965) [the Sixth Amendment right to confront opposing witnesses]; *Klopfer v. North Carolina,* 386 U.S. 213 (1967) [the Sixth Amendment right to a speedy trial]; *Washington v. Texas,* 388 U.S. 14 (1967) [the Sixth Amendment right to compulsory process for obtaining witnesses]; *Duncan v.*

*Louisiana*, 391 U.S. 145 (1968) [the Sixth Amendment right to a jury trial]; and *Benton v. Maryland*, 395 U.S. 784 (969) [the Fifth Amendment guarantee against double jeopardy].

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID ARTHUR JONES

ALLEN M. SMALLWOOD

## APPENDIX A

### 21 O.S. Supp. 1977, Sec. 701

## CHAPTER 24.—HOMICIDE

### MURDER

Sec.
701.1 to 701.6. Repealed.
701.7. Murder in the first degree [New].
701.8. Murder in the second degree [New].
701.9. Punishment for murder [New].
701.10. Sentencing proceeding—Murder in the first degree [New].
701.11. Instructions—Jury findings of aggravating circumstance [New].
701.12. Aggravating circumstances [New].
701.13. Death penalty—Review of sentence [New].
701.14. Appointment of counsel—Fees [New].
701.15. Constitutionality—Sentence [New].

### GENERAL PROVISIONS

**§691. Homicide defined.**

**§693. Proof necessary to conviction of murder or manslaughter.**

**§701. Repealed by Laws 1973, c. 167, §7, emerg. eff. May 17, 1973.**

**§§701.1 to 701.6. Repealed by laws 1976, 1st Ex.Sess., c. 1, §10, eff. July 24, 1976.**

Approved July 23, 1976. Emergency.

**§701.7. Murder in the first degree.**—A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

Laws 1976, 1st Ex.Sess. c. 1, §1, eff. July 24, 1976.

Approved July 23, 1976. Emergency.

**§701.8. Murder in the second degree.**—Homicide is murder in the second degree in the following cases:

1. When perpetrated by an act imminently dangerous to another person and evincing a depraved mind, rgardless of human life, although without any premeditated design to effect the death of any particular individual; or

2. When perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in Section 1, Subsection B, of this act.[1]

**§701.9. Punishment for murder.**—A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life.

Laws 1976, 1st Ex.Sess., c. 1, §3, eff. July 24, 1976.

[1]Section 701.7 of this title.

**§701.10. Sentencing proceeding—Murder in the first degree.**—Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstnaces enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
Laws 1976. 1st Ex.Sess., c. 1, §4, eff. July 24, 1976.

**§701.11. Instructions—Jury findings of aggravating circumstance.**—In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least

one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life.
Laws 1976, 1st Ex.Sess., c. 1, §5, eff. July 24, 1976.

**701.12. Aggravating circumstances.**—Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

2. The defendant knowingly created a great risk of death to more than one person;

3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

4. The murder was especially heinous, atrocious, or cruel;

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or

7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.
Laws 1976, 1st Ex.Sess., c. 1, §6, eff. July 24, 1976.

**§701.13. Death penalty—Review of sentence.**—A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of

Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment,offense, and attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.
Laws 1976, 1st Ex.Sess., c. 1, §7, eff. July 24, 1976.

**§701.14. Appointment of counsel—Fees.**—In all cases, wherein the defendant is subject to the death penalty triable in the State of Oklahoma, where it is satisfactorily shown to the trial court that the defendant has no means and is unable to employ counsel, the court shall, in all such cases, where counsel is appointed and assigned for defense, allow and direct to be paid from the State Judicial Fund, a reasonable and just compensation to the attorney so assigned for such services as they may render such compensation being allowable in any court of record. Provided, however, that such attorney shall not be paid a sum to exceed Two Thousand Five Hundred Dollars ($2,500.00) in any one case, the specific amount to be left to the discretion of the trial judge.
Laws 1976, 1st Ex.Sess., c. 1, §8, eff. July 24, 1976.

**§701.15. Constitutionality—Sentence.**—In the event the death penalty is held to be unconstitutional by the Oklahoma Court of Criminal Appeals or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death shall cause such person to be brought before the court, and the court shall sentence such person to imprisonment for life.

* * * * * *

## CHAPTER 16.—JUDGMENT AND EXECUTION

## SUSPENSION OF JUDGMENT AND SENTENCE

Sec.
991a-1. Nonviolent offenders—Night or weekend incarceration [New].
991d. Probation fee [New].
991e. Probation and Parole Fund [New].
991f. Definitions [New].

### GENERAL PROVISIONS

**§ 972. Rendition of judgment where cause against it not shown.**

**§ 982. Presentence investigation.**—Whenever a person is convicted of a felony except when the death sentence is imposed, the court shall, before imposing sentence to commit any felon to incarceration by the Department of Corrections, order a pre-sentence investigation to be made by the Division of Probation and Parole of the Department. he Division shall thereupon inquire into the circumstances of the offense, and the criminal record, social history and present condition of the convicted person; and shall make a report of such investigation to the court, including a recommendation for or against probation. Such reports must be presented to the judge so requesting, within a reasonable time, and upon the failure to so present the same, the judge may proceed with sentencing. Whenever, in the opinion of the court or the Division, it is desirable, the investigation

shall include a phyusical and mental examination of the convicted person. The reports so received shall not be referred to, or be considered, in any appeal proceedings. Before imposing sentence, the court shall advise the defendant or his counsel and the district attorney of the factual contents and the conclusions of any presentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. If either the defendant or the district attorney desires, such hearing shall be ordered by the court providing either party an opportunity to offer evidence proving or disproving any finding contained in such report, which shall be a hearing in mitigation or aggravation of punishment.

If the district attorney and the defendant desire to waive such presentence investigation and report, both shall execute a suitable waiver subject to approval of the court, whereupon the judge shall proceed with the sentencing.

Amended by Laws 1975, c. 369, § 1, emerg. eff. June 18, 1975.

## APPENDIX B

**Opinion, *Chaney v. State*, 612 P.2d 269 (Okla.Cr.1980)**

**Larry Leon CHANEY, Appellant,**

**v.**

**The STATE of Oklahoma, Appellee.**

**No. F-77-699.**

Court of Criminal Appeals of Oklahoma.

May 15, 1980

An appeal from the District Court, Tulsa County; Jay D. Dalton, Judge.

Larry Leon Chaney, appellant, was convicted of the offense of Murder in the First Degree; was sentenced to death and appeals. AFFIRMED.

Allen M. Smallwood, Tulsa, for appellant.

Larry Derryberry, Aty. Gen., Mary Kathleen Rhodes, Asst. Atty. Gen., Jan Eric Cartwright, Atty. Gen., David W. Lee, Asst. Atty. Gen., for appellee.

### OPINION

BRETT, Judge:

Larry Leon Chaney, hereinafter to be called the defendant, was convicted of Murder in the First Degree—21 O.S.Supp. 1979, §701.7—in the District Court, Tulsa County, in Case No. CRF—77—756. After a hearing on the aggravating and mitigating circumstances of the case, the jury voted to impose the death penalty.

The victim was Mrs. Kendal Inez Ashmore, an authority on Morgan horses. On March 17, 1977, Mrs. Ashmore and her assistant, Ms. Kathy Brown, went to meet a man neither of them knew, who had expressed an interest in Morgan

horses. They were never seen alive again. On March 22, their bodies were found buried on the defendant's property in Sequoyah County, Oklahoma. Although the defendant was charged with both deaths, the murder of Mrs. Ashmore was tried first. The trial on the murder of Ms. Brown is still pending.

**[1-3]** In his first and seventeenth assignments of error, the defendant complains that a prospective juror was excused for cause in violation of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). In *Witherspoon,* the Supreme Court held thast persons cannot be excused from jury service for cause just because they are opposed to the death penalty. They can be excused for cause if their views are so strong that they would refuse to return a verdict of guilty, where it was justified, because the defendant could be sentenced to death. Prospective jurors can also be excused for cause if they have decided in advance that they will not vote to improse the death penalty, regardless of the circumstances. However, the questioning in this area during voir dire cannot be too specific:

> ". . . The most that can be demanded of a venireman . . . is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that mighe emerge in the course of the proceedings. . . ." (Emphasis original) *Witherspoon v. Illinois,* 391 U.S. 510, n. 21, 88 S.Ct. 1770, n. 21.

In the instant case, we believe that it was proper to excuse the juror. The defendant's attorney and the State's attorney questioned the woman; and both sides point to answers given by her, which they say support their respective arguments. But one of the tendencies of voir dire in a challenge situation is that the longer it lasts the less objective it becomes, as both

parties attempt to phrase their questions in such a way as to elicit the desired answers. We are most impressed by the answers the prospective juror gave to the first questions asked by the trial court:

> "THE COURT: I'll ask you the same question I asked the other jurors. In a case where the law and evidence warrant, in a proper case, could you without doing violence to your conscience agree to a verdict imposing the death penalty?
>
> "MS. FETERLY: No, sir, I dont believe I could.
>
> "THE COURT: If you found beyond a reasonable doubt that the defendant was guilty of murder in the first degree, and if under the evidence and circumstances it would permit you to consider a sentence of death, are your reservations of the death penalty, regardless of the law and facts and circumstances of the case, such that you could not inflict the death penalty?
>
> "MS. FETERLY: No, sir, I don't think I could.
>
> "THE COURT: Did you hear my question: Are your resevations about the death penalty such that regardless of the law and facts and circumstances of the case you would not inflict the death penalty?
>
> "MS. FETERLY: Yes, sir. I understand. I could not."

The defendant also argues from *Taylor v. Louisiana,* 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), that the exclusion of this juror denied the defendant a jury which represented a cross-section of the community. But this argument is without foundation. *Taylor* involved the exclusion of all women from jury service, while in the present case only one prospective juror was excused on the *Witherspoon* issue, and we find that this was valid.

**[4]** In his second assignment of error the defendant objects to the introduction into evidence of soil samples extracted from four locations on his property near Sallisaw,

Oklahoma. But the defendant not only failed to object to the introduction of the evidence at the trial, he also failed to cite any authority to support his argument in this Court. Both of these lapses constitute failure to properly set the issue before the Court. *Robers v. State,* Okl.Cr., 568 P.2d 336 (1977), and *Robertson v. State,* Okl.Cr., 562 P.2d 880 (1977). We therefore do not reach the merits of this issue.

**[5]** The fourth assignment of error is concerned with the trial court's denial of the defendant's motion for a change of venue. Such motions are directed to the trial court's sound discretion—*Andrews v. State,* Okl.Cr., 555 P.2d 1079 (1976)—and we do not find any abuse of that discretion in this case. The record makes clear that the judge was sensitive to the publicity problem: Although he denied the defendant's motion, he said that he would reconsider it if jury selection became difficult. But no juror expressed any preconceptions as to the defendant's guilt, and the defendant was given wide latitude during the voir dire. Compare *Hammons v. State,* Okl.Cr., 560 P.2d 1024 (1977).

**[6]** The fifth assignment of error points to statements made by the prosecutors during closing argument—statements which the defendant says were intended to be emotional arguments instead of comments on the evidence. While the remarks were unnecessary, they were not so grossly improper as to affect the jury's verdict. The evidence herein, even though circumstantial, was conclusive. See *Beeks v. State,* Ok.l.Cr. 563 P.2d 653 (1977).

**[7]** We see no merit to the defendant's contention that the prosecuting attorney commented on the defendant's failure to take the stand. The judge instructed the jury that it should consider whether the aggravating circumstances in the case, if any, were offset by any mitigating circumstances, and he gave them a list of mitigating circumstances as examples.

One of these was the age of the defendant. During closing argument, the prosecutor said he had heard no evidence of the defendant's age, and this is the comment which the defendant challenges. This is not a comment on the defendant's failure to testify because there are many ways to prove one's age besides personal testimony.

**[8]** The sixth assignment of error is an umbrella-type argument challenging the introduction of several pieces of evidence. The first item is the introduction of photographs of the defendant's Chevrolet Corvette. However, the fact that a Corvette similar to the defendant's was seen in the area of the ransom money drop site could circumstantially imply that the defendant's Corvette was the vehicle observed. Because the defendant was charged with felony-murder as well as with malice aforethought murder, this evidence was relevant to connect the defendant to the kidnapping.

**[9]** The next item under this assignment is the introduction of two groups of photographs of the grave scene—State's Exhibits 44 through 61, and 104 and 105. The defendant also challenges State's Exhibit No. 71, a slide of the calf and ankle of Kendal Ashmore's leg taken during the autopsy. We have viewed the photographs in question and their introduction was not counter to our holding in *Oxendine v. State,* Okl.Cr., 335 P.2d 940 (1958). In *Oxendine* we imposed a balancing test on the introduction of photographs, which because of their subject matter, carry a danger of prejudice. Such evidence is inadmissible unless the possibility of prejudice is outweighed by the probative value. This is, of course, nothing more than the common judicial determination of relevancy. McCormick, Evidence, 438-441 (2nd Ed. 1972). And see 12 O.S. Supp.1979, §2403.

**[10]** With the exception of State's Exhibit No. 71, all of the photographs before us were taken during the exhumation

of the bodies of Mrs. Ashmore and Ms. Brown, beginning with the pile of brush covering the gravesite and ending with the photograph of Mrs. Ashmore. These photographs allowed the jury to see the manner in which the victims had been bound and the way in which they were killed, as well as the attempt that had been made to conceal the grave. The pictures are not offensive, and their admission was proper. (Exhibits 104 and 105 were photographs of Ms. Brown's body, which makes them pertinent to the ninth assignment of error; but as far as this sixth assignment of error is concerned the exhibits were not objectionable.)

**[11]** The admission of State's Exhibit No. 71 was also proer. A fact in contention was the time of Mrs. Ashmore's death in relation to the time of the kidnapping, and the defendant, hoping to disprove the State Medical Examiner's estimation of the time of death, put in issue the length of the hair on Mrs. Ashmore's legs. The State then introduced its photograph of Mrs. Ashmore's calf and ankle so that the jury could decide the issue for itself. Because the defendant invited the introduction of this exhibit by placing the matter in issue and because the picture is not gruesome, the trial court did not abuse its discretion in allowing the slide to be shown to the jury.

**[12-14]** State's Exhibits 1 and 3, tape recordings of the ransom demand telephone calls made to Mr. Ashmore, were admitted into evidence and played for the jury. The defendant challenges their introduction; but as we held in *Pearson v. State,* Okl.Cr., 556 P.2d 1025 (1976), a person may legitimately consent to the recording of conversations to which he is a party, and Mr. Ashmore consented to the taping of the telephone calls. As with photographs, a determination of relevancy must be made, weighing the probative value of the recordings against the possibility of

prejudice. And in the instant case, the balance for the tapes, as with the photographs, was in favor of admissibility. The trial judge did not abuse his discretion by allowing the introduction of this evidence.

**[15,16]** Finally, under the sixth assignment of error, the defendant complains of the admission of State's Exhibit No. 62, a videotape. The trial court agreed with the State's argumet that it would be impractical to take the jury to Sallisaw to view the gravesite and allowed the State to present a 15-20 minute videotape of the road leading to the defendant's property and the drive through that property to the gravesite. The defendant calls the tape an attempt to reenact the crime and asserts that it biased the jury.

Visits by a jury to the scene of the crime are permitted by 22 O.S.1971, §851. In evaluating the substitution of a videotape for such a visit, we again consider the factors affecting relevancy. The tape had little probative value, since it only showed the jury the character of the defendant's property. But in that respect, the tape was merely cumulative, since several witnesses described the property. The videotape could not have been used by the State to show how the murderer had tried to hide the bodies because the concealing pile of brush had been removed and the bodies exhumed. What the jury saw on the tape was a hole in the ground. (Also, in addition to the videotape, the State introduced an exhaustive series of slides taken during the exhumation, and several of these showed the site before it was disrupted.) The videotape could not have been used by the State to show whether or not the site was visible from the road because it was filmed more than a month after the murders; it was then somewhat later in the spring and the foliage was not the same as it had been at the time of the crime.

The defendant asserts that the State was attempting "to put the jury in the actual vehicle, by using a little imagination, and to take that fateful ride, along with the victims, from Highway 59 to the gravesite on the defendant's property." The evidentiary value of the tape was minimal, but it was not highly prejudicial. If anything, it was a waste of the jury's time to view the videotape.

**[17]** In his seventh assignment, the defendant objects to the visit by the jury to the Jenks rodeo grounds, where the ransom money was to be delivered. As stated above, such visits are authorized by law; and for that reason we will not overturn the trial court's decision.

Next, the defendant challenges the admission of evidence seized during a warrantless search of his residence made contemporaneously with his arrest. Title 22 O.S.1971, § 196, permits an arrest without a warrant by an officer when a felony has been committed and the officer has reasonable cause to believe that the person arrested committed the felony. That there was reasonable cause to arrest the defendant is apparent from a consideration of the circumstances: On the evening of Mrs. Ashmore's disappearance a man called Mr. Ashmore and told him that it would cost him $500,000.00 to ransom his wife. Mr. Ashmore contacted the FBI, and agents made arrangements to trace any further calls. The next evening the kidnapper made a second call, outlining instructions for payment of the ransom. That call was traced to the defendant's residence.

Law enforcement officers did not go there immediately. Instead, Mr. Ashmore attempted to comply with the ransom demands, presumably hoping to recover his wife alive. But later that evening there was a third call, accusing Mr. Ashmore of failing to follow instructions and threatening to kill Mrs. Ashmore. This call was traced to a public telephone

booth and the defendant's palm print was found on the telephone. It was at this point that the raid on the defendant's home was organized.

**[18]** The defendant maintains that the law enforcement officers had sufficient time between the time of the last call and the time of the arrest to obtain arrest and search warrants. But an emergency effort to save the victims' lives was of paramount importance. Under the circumstances, the officers acted correctly in organizing and carrying out the arrest as quickly as possible, but in a way which would minimize the likelihood of harm if the victims were being held hostage in the defendant's home.

The defendant was arrested at approximately 3:30 a.m. on March 18 and informed of his constitutional rights. At this time the officers searched the premises; and in the kitchen trash they found a scrap of paper with the words, "1:00 P.M. Thursday Richard Elliott." This is the name of the man whom Mrs. Ashmore and Ms. Brown were to meet. The meeting had been set for 1:00 p.m. Because the search included areas beyond the defendant's control, he contends it was conducted in violation of *Chimel v. California,* 395 U.S. 752, 89S.Ct. 2034, 23 L.Ed.2d 685 (1969), and was per se unreasonable.

**[19,20]** The defendant is correct in his assertion that every warrantless search is per se unreasonable. *Hughes v. State,* Okl.Cr., 552 P.2d 1154 (1976). However, there are exceptions to this rule, exceptions based on necessity. If the time required to secure a warrant could result in the loss of evidence, the escape of a suspect, or above all the death of a victim, then law enforcement officials may act without a warrant if probable cause exists. As this Court said in *Hughes v. State,* supra, the existence of an emergency permits the law enforcement officer to substitute his

judgment for that of a neutral and detached magistrate as to the existence of probable cause.

**[21]** From the content of the third and last call, the police could justifiably believe that the kidnap victims were still alive, but that their deaths were imminent. Time was of the essence. We hold that the officers were justified in conducting a warrantless search for either the victims or evidence of their location. This assignment of error is without merit.

**[22]** At the trial, the defendant attempted to prove that the words on the scrap of paper were not in his handwriting. He introduced into evidence defendant's exhibit 37, an admittedly genuine sample of his handwriting, and called a handwriting analyst to testify that the defendant had not written the note. On rebuttal, the State introduced State's Exhibits 86 through 93, which it claimed were genuine samples of the defendant's handwriting, and called a handwriting analyst of its own. In his third assignment of error, the defendant correctly asserts that the State failed to authenticate its exhibits. However, this failure does not entitle the defendant to relief because the State's expert also examined defendant's exhibit 37 before testifying. Thus, even if the State's exhibits had been barred, its expert still could have testified.

The defendant complains, in his tenth assignment of error, of the introduction of State's Exhibits 13 through 17, the clothing Mrs. Ashmore was wearing when she was last seen, and in which she was found in the shallow grave on the defendant's property near Sallisaw, Oklahoma. At the trial, the defendant offered to stipulate to thse exhibits as well as to the State's arguments in support of their admission into evidence. The defendant argues that the exhibits did not in any way aid the jury in determining any factual issues or questions.

**[23]** He complains that the jury should have been admonished to utilize the clothing only to determine the identity of the victim and not to construe these exhibits as circumstantial evidence indicating the time of death, but he does not say why. As mentioned previously, the time of death was an important issue in both the State's and the defendant's theories of the case. The State argues that the creases in the victim's jeans were a circumstantial indication that her death occurred shortly after her abduction; otherwise, the jeans would have been wrinkled. Concerning the admissibility of clothing worn by a deceased, we have held that its introduction is appropriate if it tends to solve a factual issue, illustrate a material point or shed light on a matter from which a solution to the case may be drawn, as well as to identify the victim and connect the accused with the crime. *Martin v. State,* 67 Okl.Cr. 390, 94 P.2d 270 (1939); *Brewer v. State,* Okl.Cr., 414 P.2d 559 (1966); *Noah v. State,* Okl.Cr., 562 P.2d 950 (1977). We hold that admitting these exhibits into evidence in the instant case was proper and the jury could utilize them for whatever they were worth in resolving the material factual issues.

In his next assignment of error, the defendant contends that it was improper for the trial court to allow the admission of the pieces of toweling used to bind and strangle the victims. He claims that the items were not sufficiently identified. By the testimony of various witnesses, the State established that the towel strips introduced were still on the bodies when they were discovered, thus laying a proper foundation for their introduction. However, it is clear from his brief that the defendant's assignment is actually aimed in another direction.

**[24,25]** The night before the kidnapping the defendant stayed in a motel in the Sallisaw area. The operators of the

motel testified that the defendant left at 6:30 a.m. and when they checked the room at 9:30 a.m. several towels were missing. According to these witnesses, the towels used to bind the victims closely resembled the towels missing from the defendant's room. The defendant points to the fact that the motel operators could not positively identify the bindings as the missing towels and argues that their testimony should not have been allowed. But an absolute identification is not required. The nature of circumstantial evidence is such that an absolute connection cannot be made, yet it is admitted for whatever value the trier of fact attaches to it. "The lack of positive identification in such a case affects the weight of the article or substance as evidence, rather than its admissibility.' *Richmond v. State,* Okl.Cr., 456 P.2d 897 (1969), Syllabus No. 5. This assignment of error is without merit.

The twelfth assignment of error pertains to the trial court's refusal to allow one of the defendant's witnesses to testify. At an in camera hearing, the witness testified that he was in the county jail before the kidnapping occurred and that an inmate, whom he did not know and could not name, told him the Mafia had planned a kidnapping which would occur soon in Jenks, Oklahoma. The inmate said that his brother was implicated in the crime. The witness did not know the defendant until they met in jail a few days before the defendant's trial; and when he discovered what the defendant was accused of doing he told the defendant what he had heard.

**[26,27]** After the in camera hearing, the trial judge ruled that the testimony was inadmissible hearsay. The defendant argues that the testimony fits within the "declaration against interest" exception, as that exception had been extended to include penal interests. *Howard v. Jessup,* Okl., 519 P.2d 913 (1973). But for a statement to be admissible as a

statement against penal interest, it must be against the interest of the declarant. Here, the statement implicated the declarant's brother, not the declarant, and no circumstances were shown to indicate implication of the declarant as well. This assignment of error is also without merit.

**[28]** A search of the courtroom for weapons coincided inadvertently with the jury's return to the box tobegin the second stage of the proceedings. In his thirteenth assignment, the defendant complains that the jury's observation of this search justified declaring a mistrial and that the failure to grant such a motion was error. While we do not condone a search for weapons conducted in the presence of the jury, in light of the particular circustances of the case we do not see that the panel was thereby prejudiced. The judge ordered the search because one juror had seen a gun in the purse of a spectator and had expressed apprehension to the court reporter. Assuming that the jurors were fearful for their safety, it does not follow that their cognizance of the search would result in substantial prejudice to the defendant; and the defendant makes no showing that such prejudice existed. We therefore affirm the trial court's denial of the defendant's motion for a mistrial.

The fourteenth assignment of error is an attack on Oklahoma's death penalty statute and is divided into three subdivisions. The first argument is a pholosophical one which should more properly be addressed to the Legislature in an attempt to have the death penalty repealed. The second argument is a preposterous assertion that it would be illegal for a state official to use a controlled, dangerous drug in executing the punishment.

The third argument under this assignment is a shotgun-type argument in which the defendant attempts to make several points against the second stage of the bifurcated

proceedings. The general tenor of the argument is that the Legislature has failed to insure that the death penalty will not be imposed in an arbitrary and discriminatory way. He says that the use of a presentence investigation is improperly prohibited by 21 O.S.Supp.1979, §701.10 and 22 O.S.Supp.1979, §982; but the fact is that the trial judge is expressly prohibited from suspending a sentence of death by 22 O.S.1971, §1004. Since the only purpose of a presentence investigation is to guide the judge in deciding whether to grant probation, such an investigation is obviously superfluous in a death case.

**[29]** We are not moved by the defendant's complaint that the trial court limited him to evidence of mitigating circumstances which could be presented in compliance with the rules of evidence. The second stage of a murder trial is like the first stage in being a fact-finding hearing, and the rules of evidence must be followed. The defendant cites *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), but we find nothing in that case indicating that the rules of evidence should be abrogated during the second stage.

**[30]** Another argument aimed at the second stage is the defendant's contention that the jury was not given any guidance in its evaluation of the aggravating and mitigating factors. Title 21 O.S.Supp. 1979, §701.12, names seven aggravating circumstances. Section 701.10 provides that evidence of any of these may be presented to the jury, provided the defendant has been given appropriate notice. Section 701.11 provides that the death penalty cannot be imposed unless at least one of these seven circumstances is found. Circumstances named are specific, not vague, and are readily understandable. Defendant's argument here fails to make its point.

**[31-32]** Section 701.11 also provides that the death penalty cannot be imposed if any aggravating circumstances found are outweighed by mitigating circumstances. Section 701.10 states that, "evidence may be presented as to *any* mitigating circumstance." (Emphasis added) We take this to mean that a defendant may present any relevant evidence within the limitations of the rules of evidence, bearing on his character, prior record or the circumstances of the offense. In the second stage instructions, the judge told the jury that they were not limited in their consideration of mitigating circumstances, but that they could consider any such circumstances they found from the evidence in the case. The jury was also instructed in accordance with Section 701.11 that the sentence would be life imprisonment if they found no aggravating circumstances or if mitigating circumstances outweighed the aggravating circumstances they found. We hold that these instructions gave the jury sufficient guidance to prevent an arbitrary or discriminatory application of the death penalty.

Finally, under this assignment of error, the defendant attacks the specific aggravating circumstances used in this case. The seventh circumstance in Section 701.12 is, "The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." This circumstance was alleged in the intial bill of particulars but was later dropped. The jury was not instructed on it and, contrary to the defendant's assertion, the District Attorney did not argue it. We do not understand why the defendant complains about it.

**[33,34]** The fourth circumstance named in Section 701.12 is that, "The murder was especially heinous, atrocious, or cruel." The defendant maintains that no adequate definitions exist for these three words and that any

murder would satisfy that circumstance. Instruction No. 8 defined "heinous" to mean "extremely wicked or shockingly evil;" "atrocious" was said to mean "outrageously wicked and vile;" and "cruel" was defined as "designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless." Though other definitions of these words could perhaps suffice, the definitions employed gave the jurors adequate guidance. And in regard to the defendant's assertion that all murders are especially heinous, atrocious and cruel, the manner of death in one case may certainly be distinguishable from another in the degree of atrocity or cruelty. This entire assignment of error is without merit.

**[35]** In the fifteenth assignment of error, the defendant alleges that the trial court committed error by allowing the State to present, during the first stage of the trial, evidence relating to the aggravating circumstances. A review of the transcript indicates that the defendant is correct in his contention. See, for instance, pages 392-394 and page 709 of the trial transcript. This argument is closely related to the ninth assignment of error because much of the evidence of aggravation of which the defendant complains pertained to the murder of Ms. Brown. To a certain extent, then, the discussion of that assignment, infra, is pertinent here. As to the rest of the improperly admitted evidence, we hold that the error was harmless. Even had the evidence not been admitted, the verdict of guilt unquestionably would have been the same. Modification is not appropriate since it was proper to admit the evidence in the sentencing stage.

Sixteenth, the defendant objects to the trial court's refusal to allow him to impeach the testimony of his own witness. During his investigation of the crime, the defense attorney had a conversation with a man named Frank Cooper, and he

called Mr. Cooper to testify. In his opening argument at the trial and in his brief to this Court, the defendant said he expected Mr. Cooper to testify that he had seen the defendant near Sallisaw ata time which would have made it almost impossible for the defendant to be at 91st Street and Memorial Road at 1:00 p.m. When called to the stand, however, Mr. Cooper did not so testify. The defendant then called Gary Jones, who said that he observed the conversation between Mr. Cooper and the defense attorney. The defendant wanted Mr. Jones to testify concerning that conversation, but the State's hearsay objection was sustained.

**[36]** We have examined the record and find that the trial court properly excluded the testimony of Gary Jones. Outside the presence of the jury, defense counsel attempted to assert surprise at the testimony of Mr. Cooper. But, in his opening statement to the jury, counsel related what he thought Mr. Cooper would testify to and stated, "and if Mr. Cooper testifies to that, fine." However, Mr. Cooper did not testify as defense counsel hoped he would and, in an effort to impeach the testimony related by Mr. Cooper, he offered the testimony of Mr. Jones. Mr. Cooper had not offered any inconsistent testimony subject to impeachment. Instead, the defendant was attempting to place a fact into evidence by Mr. Jones, who had no knowledge about that fact, ie. e., that the defendant was in the vicinity of Sallisaw at a particular time. Defense counsel's claim of surprise was without merit. In *Mackey v. State,* Okl.Cr., 526 P.2d 1161 (1974), this Court quoted *Sturgis v. State,* 2 Okl.Cr. 362, 102 P. 57, 68 (1909), stating that:

> " '. . . It is not enough that the witness failed to testify favorably to the party calling him, in order that previous contradictory statements made by such witness may be

> introduced in evidence, but the witness must have testified to facts injurious to the party calling him before he can be so impeached. In other words, such contradictory statements are permissible alone for the purpose of impeaching the witness, and are not original substantive evidence against the adverse party. . . .' "

In this instance, Mr. Cooper's testimony was not injurious to the defendant, and no injury has been shown. Instead, the defendant was attempting to place before the jury substantive evidence about which the witness had no actual knowledge. Therefore, we hold this assignment of error to be without merit.

The eighteenth assignment of error is a cumulative-error argument. Insofar as we have found defendant's other assignments of error to be without sufficient merit to change the results of this conviction, this assignment must also be found to be without merit.

Finally, in his ninth assignment of error, the defendant raises the issue of multiple charges against him. In addition to the present case, this defendant was charged in the District Court of Tulsa County, in Case No. CRF-77-755, with the murder of Kathy Brown, and in Case Nos. CRF-77-704 and CRF-77-705 with the kidnapping of both women. At one point in the proceedings he moved to have the two murder charges plus the two kidnapping charges consolidated for a single trial, but the motion was denied. The defendant then entered a motion in limine, asking that the State be prohibited from referring to the murder of Kathy Brown during the trial for the murder of Kendal Ashmore. This motion was also denied; however, the prosecutor repeatedly stated his intention to delete all references to Ms. Brown from the State's presentation. Had the defendant's motion to consolidate the charges been sustained, as it should have

been, the motion in limine would have been unnecessary.

But the State did not live up to its promises. In his opening statement, the prosecutor told the jury that Mrs. Ashmore had an assistant, who was also never seen again alive. Mr. Ashmore testified that Ms. Brown was with his wife and that he never saw either of them alive after the morning of the day that they were kidnapped. The jury listened to the tape recordings of the extortion calls, in which the caller threatened to do to Mrs. Ashmore what he had done to "that honky that works for you." The sheriff who testified to the uncovering of the graves told of the discovery of both bodies. During the sheriff's testimony, pictures of Ms. Brown's body were introduced. In overruling one of the defendant's objections, the trial court noted that the body in one of the photographs was not identifiable; but the clothing on that body doe not at all match the clothing described and body does not at all match the clothing described and introduced as the clothing of Mrs. Ashmore.

The defendant's ninth assignment of error arises from the fact that his motion for consolidation was denied. He contends that if the State wishes to treat the two murdersas independent events, then all references to Ms. Brown must be considered improper evidence of other crimes. The State insists that it would have been impossible to properly tell the story of the killing of Mrs. Ashmore without making at least incidental references to Ms. Brown and to the kidnappings of both women. But this argument raises another question: If the State could not separate the four crimes, why did it refuse to try them together? In *Dodson v. State,* Okl.Cr., 562 P.2d 916 (1977), we encouraged prosecutors to make proper use of the joinder provisions in the State statutes—22 O.S.1971, § § 436 et seq. There are reasons, in addition to economic ones, why it would have been better to try these four cases

together. Besides saving a great deal of expense for both the State and the defendant and reducing the District Court's case load by three major cases, a single trial would have been less of a burden on the witnesses, especially Mr. Ashmore, who had to relive the entire traumatic episode as well as identify his wife's clothing. The jury was told that it was trying the defendant for one murder, but then it was given evidence that there were in fact two murders and two kidnappings.

**[37]** With its arguments, the State has placed itself in a dilemma. For the purpose of bringing the defendant to trial, it claims that the two murders were separate and distinct crimes; but for the purpose of introducing evidence in this trial, it claims that the two murders were inseparable parts of a single criminal episode. This case is an excellent example of the sort of situation to which *Dodson* was addressed. It would have been better for all concerned parties had the two kidnap charges and the two murder charges been filed in one information, listing four separate counts. All relevant evidence could have been presented and this question of error would never have arisen.

**[38]** In addition to bringing the instant appeal, the defendant has petitioned this Court, in Case No. P-78-62, for a writ of prohibition to bar the State from further prosecution of the defendant in Tulsa County District Court Case CRF-77-755 for the murder of Ms. Brown. In accordance with the preceding discussion, we hold that the trial court erred in denying the defendant's motion to consolidate and that the prosecution should have consented to the consolidation. See *Dodson v. State,* supra. We further hold that the State is estopped from prosecuting the remaining murder charge and the two kidnapping charges pending against the defendant.

In addition to ruling on the assignments of error that are raised on appeal, this Court is required to make three determinations, 21 O.S.Supp.1979, §701.13. We have examined the record in this case and have given careful consideration to the arguments of counsel, both written in the briefs and presented at oral argument, and we hold:

1. That the sentence of death was not imposed "under the influence of passion, prejudice, or any other arbitrary factor." This was a notorious killing of two women, after they had been kidnapped and after a demand for $500,000.00 ransom had been made. The bodies of both women were buried in a shallow grave, where they were found. The trial court gave full consideration to public feeling at the time and the record is devoid of the kind of remarks that reveal bias, and we are certain that the trial judge in this case gave the appellant a fair and impartial trial.

2. That the evidence does support the jury's finding of statutory aggravating circumstances as enumerated in Section 701.12. The basis for this holding should be clear from the body of this opinion.[1]

3. That the sentence of death is not excessive nor disproportionate to the penalty imposed in similar cases, considering the nature of the crime and the resulting consequences.

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[1]The aggravating circumstances were: (1) The defendant created a great risk of death to more than one person in that he did in fact kill without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown; (2) the defendant committed the murder for remuneration or the promise of remuneration in that he killed both Kathy Ann Brown and Kendal Inez Ashmore while attempting toextort $500,000 from the Ashmore family; (3) the murder was especially heinous, atrocious and cruel; (4) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

**[39]** We have made a comparison of this case with other first degree murder cases before this Court and we find that the death penalty is not excessive.[2] We are of the opinion that this case is one of the most heinous and cruel cases considered by this Court. The manner in which the women were killed, coupled with the demand for ransom and the manner in which the bodies were disposes of, justifies the imposition of the death sentence. We find no reason to disturb or modify the sentence imposed in this Tulsa County Case No. CRF-77-756.

We have held that the State is estopped from trying the defendant for the murder of Ms. Brown in CRF-77-755, and on the two kidnapping charges pending in CRF-77-704 and CRF-77-705. However, if for any reason this case must be remanded for a new trial for the murder of Mrs. Ashmore, the State will no longer be estopped from prosecuting, nor the judge from consolidating, all four cases, under the provisions of 22 O.S.1971, § §436-440. In that instance, whether or not the charges shall be consolidated will lie entirely within the discretion of the trial court, under the provisions of 22 O.S.1971, §438. *Dodson v. State,* supra. Apparently, the trial judge in the instant case was not certain of his authority to consolidate the information over the objection of the

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[2]*Manual v. state,* Okl.Cr., 560 P.2d 1008 (1977); *Clark v. State,* Okl.Cr., 558 P.2d 674 (1977); *Strange v. State,* Okl.Cr., 462 P.2d 292 (1969); *Fesmire v. State,* Okl.Cr., 456 P.2d 573 (1969); *French v. State,* Okl.Cr., 416 P.2d 171 (1966); *Dare v. State,* Okl.Cr., 378 P.2d 339 (1963); *Doggett v. State,* Okl.Cr., 371 P.2d 523 (1962); *Young v. State,* Okl.Cr., 357 P.2d 562 (1960); *Spence v. State,* Okl.Cr., 353 P.2d 1114 (1960); *Williams v. State,* Okl.Cr., 321 P.2d 990 (1958); 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516, *rehearing denied* 359 U.S. 956, 79 S.Ct. 737, 3 L.Ed.2d 763.

District Attorney, thus abusing the discretion conferred upon him by the statute.[3]

The judgment and sentence of death is *AFFIRMED.*

CORNISH, P. J., and BUSSEY, J., concur.

* * * * * *

**John P. ABEL, Petitioner,**

**v.**

**The STATE of Oklahoma, Respondent.**

**No. PC-80-232.**

Court of Criminal Appeals of Oklahoma.

May 19, 1980.

The District Court of Washington County entered order refusing to credit prison time served in prior case. The Court of Criminal Appeals held that no error occurred in refusing to credit prison time served under first case, which judgment and sentence was vacated subsequent to defendant's convictions in three unrelated cases, to three sentences presently being served by defendant on such cases.

Affirmed.

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[3]Title 22 O.S. 1971, §438:

"*The court may* order two or more indictments or informations or both to be tried together if the offenses and the defendants, if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution was under such single indictment or information. Laws 1968, c. 311, §3." (Emphasis added)

## APPENDIX C

**Order Denying Petition for Rehearing in *Chaney v. State.***

## IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

| | | |
|---|---|---|
| LARRY LEON CHANEY, | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| -vs- | ) | No. |
| | ) | F-77-699 |
| | ) | |
| THE STATE OF OKLAHOMA, | ) | |
| | ) | |
| Appellee. | ) | |

## ORDER DENYING PETITION FOR REHEARING, ISSUANCE OF MANDATE, AND STAYING EXECUTION OF WARRANT.

On July 7, 1980, the above appellant, Larry Leon Chaney, filed his Petition for Rehearing in the above styled and numbered appeal from his conviction in Tulsa County District Court Case No. CRF-77-756. Appellant was convicted for the offense of First Degree Murder and the death sentence was imposed. This Court affirmed appellant's conviction on May 15, 1980.

NOW THEREFORE, after giving full consideration to the Petition for Rehearing filed herein, and being fully advised in the premises, this Court finds that the Petition for

Rehearing should be, and the same is therefore, DENIED. The mandate is directed to issue forthwith.

IT IS THE FURTHER ORDER OF THIS COURT that the Execution Warrant herein shall be stayed for a period of six (6) months, or until the further order of this Court, pending any appeal appellant may further pursue.

WITNESS OUR SIGNATURES and the Seal of this Court, this 12th day of September, 1980.

/s/ TOM R. CORNISH
TOM R. CORNISH, PRESIDING JUDGE

/s/ TOM BRETT
TOM BRETT, JUDGE

/s/ HEZ J. BUSSEY
JEZ J. BUSSEY, JUDGE

ATTEST:
/s/Ross N. Lillard, Jr.
Clerk

## APPENDIX D

### Amendment to U.S. Constitution

### AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

### AMENDMENT V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . ."

### AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ."

### AMENDMENT VIII

". . . [n]or [shall] cruel and unusual punishments [be] inflicted."

## AMENDMENT XIV

Section 1. "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory provisions involved are 21 O.S. Supp. 1980, §§701.7-71.15. They are printed in Appendix A, *infra*, pp. - .

## APPENDIX E

### Bill of Particulars

1. The defendant knowingly created a great risk of death to more than one person in that he did kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown as the evidence shows.
2. The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort $500,000.00 in money from the family of Kendal Inez Ashmore.
3. The murder was especially heinous, atrocious, and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.
4. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in order to prevent them from testifying against said defendant for the kidnapping charge.

No. 80-947

# In the Supreme Court of the United States

OCTOBER TERM, 1980

LARRY LEON CHANEY,
*Petitioner,*

VERSUS

STATE OF OKLAHOMA,
*Respondent.*

**On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Chief, Criminal Division

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February, 1981

## QUESTIONS PRESENTED FOR REVIEW

1. Does the excusing of one prospective juror, who stated that she would be unable to vote for the imposition of the death penalty in any case and that the fact that the death penalty could possibly be imposed made it impossible for her to be a fair and impartial juror with regard to making a determination of guilt or innocence, violate the mandates of *Witherspoon* v. *Illinois*?

2. Does Oklahoma's death penalty statute, which allows a defendant to introduce evidence of any mitigating circumstances and under which the defendant introduced a stipulation in the second stage which evidenced a good act on his behalf at an earlier time, violate the dictates of *Lockett* v. *Ohio* because it does not provide for the conducting of a separate presentencing investigation?

3. Was the search of the petitioner's residence, which was conducted under emergency circumstances while the police were attempting to ascertain the location of the missing kidnap victims and after the petitioner had been positively connected to the ransom demands, unreasonable in light of all of the circumstances confronting the police?

4. Whether *Godfrey* v. *Georgia* is inapplicable to the present case in light of the fact that *Godfrey* turned on the failure of the Georgia Supreme Court to follow its own interpretation of Georgia law requiring a supportable finding of "torture" under the applicable aggravating circumstance before the death penalty could be imposed pursuant to that circumstance?

5. Did alleged trial errors occur during the trial regarding the trial court's instructions concerning the pre-

sumption of innocence, the alleged denial of the reception of evidence in violation of *Chambers* v. *Mississippi*, and the prosecutor's closing arguments affect the defendant's right to a fair and impartial trial?

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No. 80-947

In the
Supreme Court of the United States
OCTOBER TERM, 1980

LARRY LEON CHANEY,
*Petitioner,*

VERSUS

STATE OF OKLAHOMA,
*Respondent.*

**On Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Oklahoma**

# RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent State of Oklahoma, by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Oklahoma Court of Criminal Appeals entered on May 15, 1980, and to which rehearing was denied on September 12, 1980.

## OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported at 612 P.2d 269 (Okl. Cr. 1980).

## JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on May 15, 1980. A petition for rehearing was denied on September 12, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 21 O.S. Supp. 1976, § 701.7 provides in part:

> "A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

* * *

Title 21 O.S. Supp. 1976, § 701.9 provides in part:

"A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

Title 21 O.S. Supp. 1976, § 701.10 provides as follows:

"Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

Title 21 O.S. Supp. 1976, § 701.11 provides as follows:

"In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommenda-

tion of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

Title 21 O.S. Supp. 1976, § 701.12 provides as follows:

"Aggravating circumstances shall be:

"1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

"2. The defendant knowingly created a great risk of death to more than one person;

"3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

"4. The murder was especially heinous, atrocious, or cruel;

"5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;

"6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or

"7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Title 21 O.S. Supp. 1976, § 701.13 provides as follows:

"A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

"B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

"C. With regard to the sentence, the court shall determine:

"1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

"3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

"1. Affirm the sentence of death; or

"2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

"F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

## STATEMENT OF THE CASE

Larry Leon Chaney (hereinafter referred to as petitioner) was charged by Information in the District Court of Tulsa County, State of Oklahoma, with the crime of Murder in the First Degree in violation of 21 O.S. Supp. 1976, § 701.7A. Under this Section a person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being.

The petitioner was convicted of murdering a woman by the name of Kendal Inez Ashmore by strangulation. In the second stage the State further introduced evidence that the defendant had also strangled a young woman by the name of Kathy Ann Brown, who was a horse trainer in the employ of Mrs. Ashmore and who was kidnapped and held for ransom with Mrs. Ashmore.

The facts that the State presented at trial revealed that on March 17, 1977, the decedent's husband, a man by the name of Phillip Ashmore, left his residence for work. Mr. Ashmore was in the construction business, and he and his wife also were engaged in the business of raising Morgan horses at their residence which was on a farm. Mr. Ashmore's wife, the decedent, Kendal Ashmore, came to his office at approximately 9:30 a.m. on March 17, 1977, and picked up the family pickup truck. Mr. Ashmore never saw his wife alive again.

Mr. Ashmore went to his home later that afternoon and found that neither his wife nor an employee of hers, a horse trainer by the name of Kathy Ann Brown, were there. Shortly after rounding up the horses, Mr. Ashmore received a call in which the caller stated that he had "got

your old lady and that honky that works for you and I want a half million dollars in one hundred dollar bills. . ." (Tr. 351). The caller promised to phone the next night with instructions regarding the delivery of the money. The caller also stated that if anyone heard about the call "I'll do to your wife what I did to that honky that works for you" (Tr. 351-351). Mr. Ashmore immediately called his attorney who contacted the Federal Bureau of Investigation. A recording device was then affixed to his telephone, but no more calls from the extortionist were received on that day.

The next day, March 18, Mr. Ashmore and his father-in-law secured the ransom money and returned to his home. At approximately 7:00 p.m. that evening, the same voice called again and directed Mr. Ashmore to take the money to a rodeo ground and leave it at a specified spot by 7:30 p.m. or his wife would be killed (Tr. 363). Shortly after that time, Mr. Ashmore delivered the money to the predesignated spot at the rodeo grounds. At approximately 9:30 p.m. the same day, he received another call from the same voice which advised him that he had not left the money in the proper place, that he should go get the money, and that he would receive another call the next night. The caller stated that if Mr. Ashmore did not do exactly what he was told, "I'm going to send back a big hunk of your old lady in a box to you in the mail, motherfucker" (Tr. 373). Mr. Ashmore never received any other call from that voice.

The call which was made at approximately 7:00 p.m. which directed Mr. Ashmore to the rodeo grounds was traced to the petitioner's telephone number. The call which was made at approximately 9:00 p.m. was traced to a

service station phone booth. The petitioner's palmprint was taken from the receiver handle on that telephone and positively identified as belonging to the petitioner, Larry Leon Chaney (P.H. Tr. 200). At the preliminary hearing, the State produced evidence showing that the officers, in addition to having the petitioner identified by the phone call being traced to his residence and his palmprint having been on the receiver of the telephone at the service station where another ransom threat was communicated from, had played the tape recording of the call from the petitioner's residence to the Ashmore residence to a police officer who knew the petitioner (P.H. Tr. 124-143). The officer told the other officers that the voice on the tape was that of the petitioner (P.H. Tr. 132).

Acting on this information, the police set up surveillance at the petitioner's home, which was within two (2) miles of the rodeo grounds where the ransom money was to be delivered, and on March 19, at 3:20 a.m., the police arrested the petitioner and searched his house looking for the victims or evidence of the victims' whereabouts. A piece of paper was removed from the trash can in petitioner's residence which had upon it the petitioner's fingerprints. The piece of paper contained the telephone number of Mr. Ashmore's residence and the number "9148," which was his street address.

Later that morning at approximately 9:00 a.m. on March 19, the pickup which Mrs. Ashmore had been driving was found in a location near south Tulsa. In the back of the pickup was found a piece of paper which the FBI identified as being part of a piece of paper, the other half of which was in Ashmore's home. The piece of paper

found in the Ashmore's home, which was in Mrs. Ashmore's handwriting, gave the location where she was to meet an individual who was to speak to her concerning horses. The note also gave the location where the pickup truck was found on the morning of March 19.

Finally on March 22, 1977, the body of Mrs. Ashmore was found in a shallow grave on the petitioner's property near the city of Sallisaw, a town approximately 100 miles east of Tulsa. Her body was bound and gagged and she had been strangled with a strip of a towel.

Other evidence which the State presented placed the petitioner in the area near where Mrs. Ashmore's body was found and placed him in a motel near Sallisaw where the owners found several towels missing the day after he checked out. The towels were similar to the ones used to strangle Mrs. Ashmore. The property where Mrs. Ashmore's body was buried had been previously rented by petitioner who had been building a house at this location. A pick-ax which was found at the petitioner's residence when he was arrested was found to have soil particals on it similar to that at the location where the bodies were buried.

The jury found the petitioner guilty, and in the second stage of the proceeding, the State introduced evidence that Kathy Ann Brown, the horse trainer who had worked for Mrs. Ashmore and who also had been missing, had also been bound, gagged, strangled, and buried in the same grave with Mrs. Ashmore on the petitioner's property. The petitioner introduced evidence in mitigation, a stipulation concerning testimony about the petitioner's alleged heroism in saving a person from a burning truck on an earlier occasion.

The jury returned the verdict imposing the death penalty finding four aggravating circumstances as follows:

1. The defendant knowingly created a great risk of death to more than one person in that he did in fact kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown, as the evidence shows.

2. The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort $500,000.00 in money from the family of Kendal Inez Ashmore.

3. The murder was especially heinous, atrocious, and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.

4. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in order to prevent them from testifying against said defendant for the kidnapping charge.

All four of these aggravating circumstances were specifically designated by the foreman on a form separate from the verdict form (O.R. 193).

## REASONS WHY THE WRIT SHOULD BE DENIED

### I. THE EXCUSING OF ONE PROSPECTIVE JUROR WHO COULD NOT IMPOSE THE DEATH PENALTY REGARDLESS OF THE FACTS AND CIRCUMSTANCES OF THE CASE AND WHOSE FEELINGS CONCERNING THE DEATH PENALTY WERE SO STRONG THAT SHE "FEARED" THAT SHE WOULD BE INCAPABLE OF MAKING A DETERMINATION OF GUILT OR INNOCENCE IN THE FIRST STAGE OF THE PROCEEDING, DID NOT VIOLATE THE DICTATES OF *WITHERSPOON* v. *ILLINOIS*.

The petitioner contends that a violation of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), occurred when a prospective juror, a Ms. Feterly, was excused for cause due to her opposition to the death penalty. However, a review of the voir dire of Ms. Feterly (Tr. 95-100) reveals that this contention is meritless. The relevant parts of the questioning of Ms. Feterly reveal the following dialogues between the trial court, the defense attorney (Mr. Smallwood) and the prosecutor (Mr. Fallis):

> "THE COURT: I'll ask you the same question I asked the other jurors. In a case where the law and evidence warrant, in a proper case, could you without doing violence to your conscience agree to a verdict imposing the dealth [sic] penalty?
>
> "MS. FETERLY: No, sir, I do not believe I could. (Tr. 95).
>
> * * *
>
> "THE COURT: Did you hear my question: Are your reservations about the death penalty such that regardless of the laws and facts and circumstances of the case you would not inflict the death penalty.

"MS. FETERLY: Yes, sir. I understand. I could not." (Tr. 96).

* * *

And later:

"THE COURT: . . . are you saying there is no circumstances under which you could follow that instruction whether you agree with it or not? Could you follow that instruction if the Court so instructed you? If you don't understand my question and it is too long, ask me.

"MS. FETERLY: I understand, sir. I cannot personally set judgment on any individual's life. It is just too horrible to me and I could not do it." (Tr. 97).

Further, at page 98, the following excerpt is found:

"(Mr. Smallwood) . . . Is your feeling so strong that you would be incapable of making a determination of guilt or innocence in the first proceeding?

"MS. FETERLY: I fear it would be."

Continuing on page 99, the voir dire, in pertinent part, reads:

"(Mr. Smallwood) . . . Would it be absolutely impossible for you to make a determination under any circumstances you can imagine in which you could do so, in which you could impose the death penalty?

"MS. FETERLY: Yes."

* * *

"MR. FALLIS: All right, ma'am. Do I understand you correctly that you are saying that in a case where one of the potential punishments can be death

you feel that that fact would make it impossible for you to be fair and impartial to both sides?

"MS. FETERLY: Yes, sir." (Tr. 99-100).

And, finally, the Court, at page 100, again asked:

"THE COURT: Ms. Feterly, I want to make sure I don't misunderstand what you are saying, but I think you made the statement that you could not be fair and impartial in this particular case because the death penalty could possibly be imposed. Is that correct?"

"MS. FETERLY: Yes, sir."

From this dialogue it is obvious that Ms. Feterly was properly excused for cause in accordance with the *Witherspoon* decision. As was stated in *Witherspoon:*

"The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." 391 U.S. at 522, n. 21.

Furthermore, Ms. Feterly's answers make it clear that her "attitude toward the death penalty would prevent [her] from making an impartial decision as to [petitioner's] guilt." *Id.*, 391 U.S. at 522, n. 21. *Cf. Adams* v. *Texas*, ____ U.S. ____, 65 L.Ed.2d 581, 100 S.Ct. 2521 (1980), where the Court held that a prospective juror can constitutionally be excused for cause when it is clear that the juror's feelings about the death penalty are such that his ability to perform as a juror and follow the instructions of the court

under his oath would be "substantially impaired." The State contends that the trial court was correct in excusing Ms. Feterly due to the fact that she would be unable to "consider fairly the imposition of the death sentence in a particular case." *Boulden v. Holman,* 394 U.S. 478, 484 (1969).

Finally, it should be noted that only one other juror was removed for cause from the entire jury panel, and that was because she knew the children of one of the strangled women (Tr. 309). Therefore, the remaining panel members did not produce a "jury uncommonly willing to condemn a man to die," *Witherspoon* v. *Illinois,* 391 U.S. at 521, and was not "a tribunal organized to return a verdict of death." *Id.* at 521-522.

## II. THE OKLAHOMA DEATH PENALTY STATUTE, WHICH ALLOWS A DEFENDANT TO INTRODUCE EVIDENCE OF ANY MITIGATING CIRCUMSTANCE, IS IN ACCORDANCE WITH THE DICTATES OF *LOCKETT* v. *OHIO,* AND THE UNITED STATES CONSTITUTION DOES NOT REQUIRE A STATE TO PROVIDE A SEPARATE PRESENTENCING INVESTIGATION.

The petitioner contends that Oklahoma's death statute is defective because it does not provide for the conducting of a separate presentencing investigation in addition to a separate sentencing proceeding pursuant to 21 O.S. Supp. 1976, § 701.10. Section 701.10 allows the defendant in a capital case to present evidence of "any mitigating circumstances" in the sentencing stage. *Cf. Lockett* v. *Ohio,* 438 U.S. 586 (1978), where the Court held that a defendant in a capital case must be allowed to present any relevant evi-

dence bearing on his character, prior record, or the circumstances of the offense in mitigation of punishment. In the present case the trial judge specifically instructed the jury that they were not limited as to any mitigating circumstances that they might find from the evidence (O.R. 188). The record reveals that petitioner, in the second stage, was allowed to introduce evidence that he had saved a man from a burning car on a previous occasion (Tr. 1264-1266). The State contends that petitioner's claim that he was denied the right to introduce evidence of this "act of heroism" during the second stage is flatly not true (Petition, pp. iii and 5). The trial court refused admission of this evidence only during the first stage (Tr. 959-968).

Nowhere in any of this Court's decisions is there a requirement that a presentencing investigation is required in a capital case in addition to a separate sentencing stage where the defendant is free to introduce any evidence in mitigation as to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis of a sentence of less than death." *Lockett* v. *Ohio,* 438 U.S. at 605. In Oklahoma, during the separate sentencing proceeding conducted pursuant to 21 O.S. Supp. 1976, § 701.10, a defendant is free to introduce any relevant evidence bearing on these factors. *Chaney* v. *State,* 612 P.2d 269, 279 (Okl. Cr. 1980). In the present case, the Oklahoma Court of Criminal Appeals held that the second stage must be conducted in accordance with the rules of evidence. *Id.* at 279. However, the petitioner has failed to demonstrate that in this case the rules of evidence have been applied "mechanistically to defeat the ends of justice." *Green* v. *Georgia,* 442 U.S. 95 (1979).

## III. THE SEARCH OF THE PETITIONER'S RESIDENCE, WHICH WAS CONDUCTED UNDER EMERGENCY CIRCUMSTANCES WHILE THE POLICE WERE ATTEMPTING TO ASCERTAIN THE LOCATION OF THE MISSING KIDNAP VICTIMS AND AFTER THE PETITIONER HAD BEEN POSITIVELY CONNECTED TO THE RANSOM DEMANDS, WAS REASONABLE IN LIGHT OF ALL THE CIRCUMSTANCES CONFRONTING THE POLICE.

The petitioner contends that the search of his residence was illegal and unreasonable because it was conducted without a search or arrest warrant. The State would respond by first noting that traditionally emergency situations excuse the necessity of obtaining a warrant, and the facts of the present case reveal such emergency where the police had a duty and a responsibility to attempt to save the lives of the victims.

It should be remembered that in the present case the victims, two women who were eventually found strangled, had been missing from sometime during the day of March 17 until 3:00 a.m. on March 19, the date and time of petitioner's arrest. During that time Mrs. Ashmore's husband had received three phone calls threatening the life of his wife and demanding $500,000.00 in ransom.

The officers had discovered that one of the calls came from the petitioner's residence. Another call came from a telephone booth at a service station where petitioner's palmprint was lifted from the receiver and positively identified as the petitioner's prior to entry into his house (P.H. Tr. 200). The officers also had positive identification that the voice which was recorded and came from petitioner's resi-

dence to the Ashmore residence was the same as the voice making one of the ransom demands (P.H. Tr. 124-143).

The officers, armed with this information, then waited at petitioner's residence, arrested him, and searched the house looking for either the victims or evidence of their whereabouts. In a wastebasket on the floor in petitioner's kitchen, an F.B.I. agent found a note which had petitioner's fingerprints on it and upon which was written the Ashmore's telephone number and street address number "9148" (Tr. 535-540).

The Oklahoma Court of Criminal Appeals upheld the validity of the search stating that "the officers were justified in conducting a warrantless search for either the victims or evidence of their location." 612 P.2d at 277. This Court has repeatedly recognized that on occasion emergency circumstances exist that allow searches where a warrant would otherwise be required. In *Mincey* v. *Arizona*, 437 U.S. 385 (1978) while condemning a warrantless search that lasted four days, the Supreme Court reaffirmed the right of police to respond to emergency situations. The Court quoted from *Wayne* v. *United States*, 318 F.2d 205 (D.C. Cir. 1964) as follows:

> " 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' " 437 U.S. at 392-393.

It should be noted that the opinion in *Wayne* v. *United States*, supra, was written by Chief Justice (then Judge) Burger and includes another quotation which is particularly relevant in the present case:

> "Police should not be required to lay seige to an apartment to await a search warrant while a life may be at stake." 318 F.2d at 214.

In *Warden* v. *Hayden*, 387 U.S. 294 (1967) the Supreme Court upheld a warrantless search of defendant's house after police arrested defendant for armed robbery within minutes after the crime. The search of the house, after defendant had been arrested on the first floor, revealed a shotgun and pistol in the flush tank of the adjoining bathroom, a jacket and trouser in a washing machine in the basement, a clip of ammunition and a cap under a mattress in defendant's bedroom, and more ammunition in a bureau drawer. The Court upheld the admission into evidence of all these items, and noting the exigency of the moment, commenting:

> "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives *or the lives of others.*" 387 U.S. at 298-299. (Emphasis added).

This case is distinguishable from *Payton* v. *New York*, ____ U.S. ____, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980) in that *Payton* involved no exigent circumstances as was the case here. Law enforcement officers, when the appropriate emergency situation arises, should have the freedom of action demonstrated here when the situation involves literally a matter of life and death. Life is replete with situations which might arise where the moment's demand requires an immediate good faith response by the police. *People* v. *Sirhan*, 7 Cal.3d 369, 497 P.2d 1121, 102 Cal.Rptr. 385 (1972), *cert. denied*, 410 U.S. 947 (1973). The police in the present

case did exactly what any civilized society would expect them to do when confronted with the barbaric acts exhibited by petitioner.

**IV. *GODFREY* v. *GEORGIA* IS NOT APPLICABLE TO THE PRESENT CASE IN THAT *GODFREY* TURNED ON THE FAILURE OF THE GEORGIA SUPREME COURT TO FOLLOW ITS OWN INTERPRETATION OF GEORGIA LAW REQUIRING A SUPPORTABLE FINDING OF "TORTURE" UNDER THE APPLICABLE AGGRAVATING CIRCUMSTANCE BEFORE THE DEATH PENALTY COULD BE IMPOSED PURSUANT TO THAT CIRCUMSTANCE AND, *ALTERNATIVELY*, THE IMPOSITION OF THE DEATH PENALTY IN THE PRESENT CASE, WHERE THE FACTS REVEAL THAT THE PETITIONER KIDNAPPED FOR RANSOM AND THEN BOUND, GAGGED, AND STRANGLED TWO WOMEN AND BURIED THEIR BODIES IN A SHALLOW GRAVE, WAS NOT VIOLATIVE OF THE DICTATES OF *GODFREY* v. *GEORGIA* IN THAT THERE IS A "PRINCIPLED WAY" TO DISTINGUISH THIS CASE FROM OTHER CASES IN WHICH THE DEATH PENALTY IS IMPOSED.**

The petitioner claims that the imposition of the death penalty in the present case violates the holding of this Court in *Godfrey* v. *Georgia*, ____ U.S. ____, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980). However, the State contends that *Godfrey* was restricted to the application of a particular aggravating circumstance under Georgia law by the Georgia Supreme Court. The sole aggravating circumstance involved in *Godfrey* provided that the death penalty may be imposed in cases where the murder

> "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind,

> or aggravated battery to the victim." *Godfrey* v. *Georgia*, 64 L.E.2d at 403, *quoting* Ga. Code Ann. § 27-2534.1(b)(7).

In reviewing the *Godfrey* case, the plurality made it clear that the case turned on the Georgia Supreme Court's failure, in carrying out its statutorily imposed review of death sentences, to apply Section (b)(7) consistently and in accordance with that Court's own enunciated interpretation of Section (b)(7). The plurality, recognizing that under Georgia law the Georgia Supreme Court has a duty to review death sentences and determine whether the evidence supported the sentencer's findings as to aggravating circumstances, stated:

> "In past cases the State Supreme Court has apparently understood this obligation as carrying with it the responsibility to keep § (b)(7) within constitutional bounds. Recognizing that 'there is a possibility of abuse of [the § (b)(7)] statutory aggravating circumstance,' the court has emphasized that it will not permit the language of that subsection simply to become a 'catch all' for cases which do not fit within any other statutory aggravating circumstance. Harris v State, 237 Ga 718, 732, 230 SE2d 1, 10 (1976). Thus, in exercising its function of death sentence review, the court has said that it will restrict its 'approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core.' Id., 237 Ga, at 733, 230 SE2d, at 11." *Godfrey* v. *Georgia*, 46 L.Ed.2d at 407.

The plurality in *Godfrey* then pointed out that in *Harris* v. *State*, 237 Ga. 718, 230 S.E.2d 1 (1976) and *Blake* v. *State*, 239 Ga. 292, 236 S.E.2d 637 (1977), the Georgia Supreme Court had interpreted Section (b)(7) to require that

the murder be "torturous" in nature before Section (b) (7) could be applied. The plurality then noted that in *Godfrey*, the Georgia Supreme Court had failed to limit the application of Section (b) (7) as it previously said it would. The plurality stated:

> "The Harris and Blake opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b) (7) aggravating circumstance. The first was that the evidence that the offense was 'outrageously or wantonly vile, horrible or inhuman' had to demonstrate '*torture*, depravity of mind, or an aggravated battery to the victim.' The second was that the phrase, 'depravity of mind,' comprehended only the kind of mental state that led the murder to *torture* or to commit an aggravated battery before killing his victim. The third, derived from Blake alone, was that the word, '*torture*,' must be construed in pari materia with 'aggravated battery' so as to require evidence of *serious physical abuse of the victim before death*. Indeed, the circumstances proved in a number of the § (b) (7) death sentence cases affirmed by the Georgia Supreme Court have met all three of these criteria.
>
> *"The Georgia courts did not, however, so limit § (b)(7) in the present case."* (Emphasis added). *Godfrey* v. *Georgia*, 64 L.Ed.2d at 408.

After discussing the specific facts of the case, and emphasizing that both the prosecutor and trial judge affirmatively stated that there was no element of torture involved, the plurality stated:

> "The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself in the Harris and Blake cases." *Godfrey* v. *Georgia*, 64 L.Ed.2d at 609.

That *Godfrey* turned on a failure of the Georgia Supreme Court to follow its own law is further emphasized in the concurring and dissenting opinions. In his concurring opinion, Mr. Justice Marshall referred to "the plurality's characterization of the decision below as an aberrational lapse on the part of the Georgia Supreme Court from an ordinarily narrow construction of § (b) (7)." 64 L.Ed.2d at 411. Mr. Justice White, in his dissenting opinion, stated the issue of the case was "whether in affirming petitioner's death sentence, the Georgia Supreme Court adopted such a broad construction of Ga Code Ann § 26-2534.1 (b) (7) as to violate the Eighth and Fourteenth Amendments to the United States Constitution." 64 L.Ed2d at 415.

A further indication that *Godfrey* deals only with Georgia's application of its own law is found in the fact that eight days following the *Godfrey* decision, this Court vacated death sentences in six other Georgia cases and remanded them to the Georgia Supreme Court "for further consideration in light of *Godfrey* v. *Georgia* (citation omitted)." *See Davis* v. *Georgia, cert. granted,* ___ U.S. ___, 64 L.Ed.2d 819 (1980); *Spraggins* v. *Georgia, cert. granted,* ___ U.S. ___, 64 L.Ed.2d 820 (1980); *Collins* v. *Georgia, cert. granted,* ___ U.S. ___, 64 L.Ed.2d 820 (1980); *Baker* v. *Georgia, cert. granted,* ___ U.S. ___, 64 L.Ed.2d 820 (1980); *Hamilton* v. *Georgia, cert. granted,* ___ U.S. ___, 64 L.Ed.2d 820 (1980); and *Brooks* v. *Geeorgia, cert. granted,* ___ U.S. ___, 64 L.Ed.2d 821 (1980).

The State submits that *Godfrey* dealt solely with the Georgia Supreme Court's failure to follow and apply its own law as it said it would. Petitioner's attempt to equate the language of *Godfrey* to the present case is without

foundation. He would have this Court make a comparison of the facts in the present case to those of *Godfrey*. Yet, his argument must fail. The aggravating circumstance involved in *Godfrey* was that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27-2534.1(b)(7). The aggravating circumstance at issue here, although not the only one relied upon, is whether the murder was "especially heinous, atrocious, or cruel." The Oklahoma Court of Criminal Appeals has defined that phrase for application in Oklahoma in a manner very similar to the definition employed by the Florida Supreme Court. *See Eddings* v. *State*, 616 P.2d 1159, 1167 (Okl. Cr. 1980); *Chaney* v. *State*, 612 P.2d 269, 280 (Okl. Cr. 1980). Yet the Oklahoma Court has affirmatively rejected the notion that "especially heinous, atrocious, or cruel" means torturous. *See Irvin* v. *State*, 617 P.2d 588, 598-599 (Okl. Cr. 1980). The Oklahoma Court of Criminal Appeals has applied this phrase, in large part to the defendant's state of mind and to the specific facts of the murder, not simply to the physical pain endured by the victim.

Moreover, petitioner would have this Court base its decision solely on a comparison of the single aggravating circumstance employed in *Godfrey* with the four aggravating circumstances found to exist in the present case. The State submits that *Godfrey* must be restricted to the application of Georgia law and should not be the basis of a nationwide factual comparison of death penalty cases. The State submits that the crucial element for review is the consistency of the application of the death penalty within

any given state. The State submits that the Oklahoma Court of Criminal Appeals has applied Oklahoma law with consistency.

*Alternatively,* should this Court wish to make a factual comparison of *Godfrey* with the present case, the State submits that the present case far surpasses *Godfrey.* The State contends that the facts of the case reveal one of the more hideous crimes imaginable. The Oklahoma Court of Criminal Appeals stated:

> ". . . this case is one of the most heinous and cruel cases considered by this Court. The manner in which the women were killed, coupled with the demand for ransom and the manner in which the bodies were disposed of, justified the imposition of the death penalty." 612 P.2d at 283.

The facts of the present case are immediately distinguishable from those in *Godfrey.* There the defendant, after a "heated" argument with family members who were causing him extreme emotional trauma, killed "instantaneously." In the present case, the petitioner calculatedly murdered two women who were strangers to him and whom he had kidnapped. The victims were strangled by strips of towels after having been bound and gagged.

Furthermore, in the present case the jury was instructed regarding the words "especially heinous, atrocious or cruel" in accordance with the construction of the identical Florida aggravating circumstance in *State* v. *Dixon,* 283 So.2d 1, 9 (Fla. 1973). *See Proffitt* v. *Florida,* 428 U.S. 242, 255-256 (1976); (O.R. 191). As discussed previously, this definition has been adopted by the Oklahoma Court of Criminal Appeals as well. *Irvin* v. *State,* supra at 598-599.

The State submits that the facts of this case fall directly in the categories of murder which Justice Stewart noted "where the possible penalty of death may well enter into the cold calculus that precedes the decision to act." *Gregg* v. *Georgia*, 428 U.S. 153, 186 (1976). Justice Stewart enumerated certain types of murders which he was referring to as follows:

> "Other types of calculated murders, apparently occurring with increasing frequency, include the use of bombs or other means of indiscriminate killings, *the extortion murder of hostages or kidnap victims*, and the execution-style killing of witnesses to a crime." 428 U.S. at 186, n. 33. (Emphasis added).

Obviously, the present case falls within the category of "extortion murder of hostages or kidnap victims."

## V. THERE WERE NO TRIAL ERRORS WHICH OCCURRED WHICH AFFECTED THE PETITIONER'S CONSTITUTIONALLY PROTECTED RIGHTS.

The petitioner claims that a number of other errors occurred at trial which violated his constitutional rights. The State will respond to those claims in one proposition.

The petitioner claims, on page 19 of his Petition, that the decision "probably conflicts" with *Taylor* v. *Kentucky*, 437 U.S. 478 (1978) "because the trial judge in the instant case failed to instruct the jury specifically that it was to presume the petitioner innocent of the second murder charge at all times throughout both stages." The State flatly states that this assertion is untrue. The record reveals that the court instructed the jury as follows in the second stage:

> "The defendant is presumed to be innocent of the charge made against him in said bill of particulars, and innocent of each and every material element of said charge, and this presumption of innocence continues until such time as his guilt thereof is shown to your satisfaction beyond a reasonable doubt, and if, upon a consideration of all the evidence, facts and circumstances in the case you entertain a reasonable doubt of the guilt of the defendant of the charge made against him in said bill of particulars you must give him the benefit of that doubt." (O.R. 183).

The instructions also covered the presumption of innocence at the first stage as well (O.R. 154). Therefore, this contention is totally without merit.

The petitioner claims that this Court's ruling in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), was not followed when the trial court refused to allow him to cross-examine his own witness concerning a previous conversation the petitioner's attorney and he had previously had, and also refused to allow another witness to testify as to the substance of that conversation. The State assumes petitioner is referring to the testimony of Frank Cooper (Tr. 907-915), and Gary Jones (Tr. 916-929), which was discussed by the Oklahoma Court of Criminal Appeals in its opinion, 612 P.2d at 280-281. The record of this testimony reveals that the defense attorney was not surprised by the witnesses' testimony. The Oklahoma Court of Criminal Appeals noted that the petitioner's attorney, in his opening statement, related what he thought the witness would testify to and then stated "and if Mr. Cooper testifies to that, fine." 612 P.2d at 281. Additionally, the Oklahoma Court of Criminal Appeals noted that it is the rule in Oklahoma

that before a witness can be impeached, the testimony must be injurious to the defendant and found that Mr. Cooper's testimony did not qualify in that regard. *Chambers* v. *Mississippi* is, therefore, clearly distinguishable. In that case the witness surprised the defense attorney by repudiating a previously sworn statement in which he admitted killing the victim himself. The purported testimony in the present case does not approach that in *Chambers,* and the Oklahoma hearsay rule did not work to frustrate justice as it did in *Chambers.*

The petitioner also objects to a part of the prosecutor's closing argument in which the prosecutor made a reference to when St. Patrick drove a serpent out of Ireland (Tr. 1184). The Oklahoma Court of Criminal Appeals found that the remarks were not so grossly improper as to affect the jury's verdict. 612 P.2d at 275. The State contends that in view of the overwhelming nature of the evidence and the fact that the petitioner did not challenge the sufficiency of such on appeal, that the remarks, in the context of the entire record, were not "so fundamentally unfair as to deny him due process." *Donnelly* v. *DeChristoforo,* 416 U.S. 637 (1974).

## CONCLUSION

For these reasons, the State of Oklahoma respectfully requests that this petition for writ of certiorari be denied.

Respectfully submitted,

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February, 1981

## CERTIFICATE OF SERVICE

On this _____ day of February, 1981, three (3) true and correct copies of the foregoing Brief in Opposition were served as prescribed by the Rules of this Court, by placing same in the U. S. Mail, postage fully prepaid, to:

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